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In Mitigation of Illegality: The U.S. Invasion of Panama

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INTRODUCTION

On December 20, 1989, the United States of America invaded Panama in what was labelled by U.S. policymakers as "Operation Just Cause." Twenty-six American and at least 700 Panamanian lives were lost in the action, and an incalculable amount of property damage was sustained.[1] Almost simultaneous to the invasion, the U.S. launched an impressive effort to justify its actions. The U.S. action against Panama raises four categories of issues:

1. Was the action lawful?
2. What effect did the law have on U.S. policy toward Panama and on the decision to resort to military force?
3. Can the invasion be justified by mitigating circumstances even if it is unlawful?
4. What are the consequences for the international legal order?

This Article traces the historical involvement of the U.S. in Panama and sketches the factual circumstances leading to the U.S. invasion of Panama. The illegality of each of the justifications proffered by the U.S. is demonstrated.[2] The extent to which the law affected the shaping of U.S. objectives in Panama, the process by which the U.S. sought to achieve those objectives, and the manner in which the U.S. tried to legitimize its action are dis-

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[1] Estimates of the actual number of Panamanian casualties have ranged from 700 to 2000. *How the Invasion of Panama Affects International Law and the Bahamas*, Sears, 203 N.Y.L.J., Jan. 25, 1990, at 1, col. 1; Nanda, *The Validity of United States Intervention in Panama Under International Law*, 84 AM. J. INT'L L. 494, 497 (1990).

[2] *See infra* notes 44-167 and accompanying text.

cussed.[3] The reasons for, and the success of, U.S. efforts to justify its unlawful action, or at least temper the reaction of the international community by emphasizing Noriega's drug trafficking activities and interference with democratic processes, are also examined.[4] The manner in which preventative law and the framing of U.S. goals could have averted the unlawful U.S. action is canvassed.[5] Finally, this Article addresses the implications of the U.S. action for the international legal order.

I. U.S. INTERVENTIONISM

The United States has a well-chronicled record of pursuing an interventionist policy in Central America and the Caribbean. During the early nineteenth century, the U.S. policy of intervention in the region arose from a perceived need to defend the security interests of the continental United States. Interference by European powers in Central America was regarded as potentially injurious to U.S. security interests. The Monroe Doctrine was the product of this concern. Pursuant to the Monroe Doctrine, the U.S. initially sought to protect the Americas against colonization by Europe.[6] The Monroe Doctrine was later transformed into a policy of outright U.S. military intervention, unprovoked by European intermeddling.[7]

The exertion of influence over countries in the Americas and the willingness to intervene to maintain that influence is clearly shown in the historical involvement of the U.S. in Panama, a country that gained its independence precisely because of U.S. military intervention.

Until 1903, Panama was a part of Colombia. When the Senate of Colombia failed to ratify a treaty that would have enabled the

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[3] *See infra* notes 168-82 and accompanying text.

[4] *See infra* notes 172-81 and accompanying text.

[5] *See infra* notes 180-82 and accompanying text.

[6] In 1823, U.S. President Monroe proclaimed that the U.S. had a special interest in the Western hemisphere. He also announced a determination to exclude European influence and interference in the Western hemisphere. D. ARMSTRONG, THE RISE OF THE INTERNATIONAL ORGANIZATION: A SHORT HISTORY 98 (1982); A. THOMAS, NON-INTERVENTION—THE LAW AND ITS IMPORT IN THE AMERICAS 30, 52-53 (1956).

[7] In 1905 President Roosevelt modified the Monroe Doctrine by declaring a right of unilateral intervention in Latin America to maintain order. A. THOMAS, *supra* note 6, at 30, 52-53. U.S. interventionism produced severe strains in relations with countries in the Americas, many of which resented U.S. dominance in the region and the resulting political and economic dependence such dominance fostered. E. HOYT, LAW AND FORCE IN AMERICAN FOREIGN POLICY 230 (1985).

United States to build a canal across the isthmus of Panama, a revolution was launched by a group of Colombians led by Frenchman Phillipe Bunau-Varilla. The group seized Colombian governmental facilities and declared Panama's independence. The United States prevented Colombian forces from landing on the isthmus to suppress the insurrection. Several days later, the U.S. recognized Panama despite an 1846 U.S.-Colombian treaty that obligated the U.S. to guarantee Colombian sovereignty over the isthmus of Panama.[8] Although historians continue to debate what role, if any, the U.S. played in the 1903 revolution, Sol M. Linowitz, Senior U.S. Adviser to the 1977 Panama Canal negotiations, confirmed that the 1903 revolution occurred with the "knowledge, if not the acquiescence of the U.S."[9]

A new treaty was signed with Panama in November of 1903. The Hay-Bunau-Varilla Treaty [hereinafter the 1903 Treaty][10] was embarrassingly favorable to the U.S.[11] Under Article III of the 1903 Treaty, Panama ceded to the U.S. rights "in perpetuity" to construct a canal ten miles wide, over which the U.S. would exercise rights, powers, and authority as "if it were the sovereign . . to the entire exclusion of the exercise by the Republic of Panama of any such sovereign rights, power or authority."[12] In

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[8] The Biolack-Mallarino Treaty exchanged U.S. guanantees of sovereignty for free U.S. citizen transit across the isthmus. *See* D. KITCHEL, THE TRUTH ABOUT THE PANAMA CANAL 47 (1978).

[9] Address by S. Linowitz, *Why a New Panama Canal Treaty?*, The American Legion Convention (Aug. 19, 1977), *reprinted in* 77 DEP'T STATE BULL. no. 1999, 520-21 (Oct. 17, 1977) [hereinafter Linowitz Address]. After the 1903 revolt, President Theodore Roosevelt proclaimed that Panama "rose literally as one man." A cynical U.S. senator remarked "Yes, and the one man was Roosevelt." President Roosevelt advocated a big-stick policy: "Speak softly and carry a big stick; you will go far." CENTER FOR STRATEGIC STUDIES, GEO. UNIV. *Panama Canal Issues and Treaty Talks* 8-10 (1967) [hereinafter *Panama Canal Issues*]; Bell, *The President, the Congress and the Panama Canal: An Essay on the Powers of the Executive and Legislative Branches in the Field of Foreign Affairs*, 16 GA. J. INT'L & COMP. L. 607, 611-12; L.A. Times, Dec. 21, 1989, § A, at 7, col. 1.

[10] The 1903 Treaty was actually drafted by Frenchman Phillipe Bunau-Varilla, who was a stockholder in a bankrupt French Canal company, which was unable to build the canal. The company sought to recover some of the losses suffered by persuading the U.S. to purchase its construction rights. *See* G. MOFFETT, THE LIMITS OF VICTORY—THE RATIFICATION OF THE PANAMA CANAL TREATIES 21 (1985); *Panama Canal: The New Treaties*, Dept. of State Publication No. 8924, 4 (Inter-American Series 114) (1977) [hereinafter *New Treaties*].

[11] Bunau-Varilla included in the treaty terms overwhelmingly favorable to the U.S. to ensure U.S. Senate ratification. G. MOFFETT, *supra* note 10, at 23.

[12] G. MOFFETT, *supra* note 10, at 22. The grant of jurisdictional rights in perpetuity within the 10 mile wide strip of territory ("the Canal Zone") was not well received by the provisional government of Panama, which sought to avoid entering into any agreement

exchange for these concessions, the U.S. agreed to pay Panama a token annuity.[13]

The successful construction of the Canal represented a remarkable feat in American engineering. The process by which the 1903 Treaty was secured and the extremely unfavorable provisions to Panama constituted a recipe for injured Panamanian pride and dignity as well as future Panamanian resentment.[14]

The unfairness of the 1903 Treaty gave rise to occasional episodes of Anti-American riots.[15] Tension between Panama and the U.S. reached a high point in 1964 when riots broke out after the U.S. agreed to recognize the residual sovereignty of Panama over the Canal by allowing the Panamanian flag to be flown in the Canal Zone.[16]

The Government of Panama temporarily suspended diplomatic relations with the U.S. by recalling its Ambassador from Washington. Three months later, the two countries agreed to reestablish normal diplomatic contacts and to resolve their differences by reaching a "just and fair agreement which would be subject to the constitutional process of each country."[17]

Negotiations between the two countries ensued for thirteen years[18] and culminated in the signing of the Panama Canal Treaties

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infringing upon the territorial sovereignty of Panama. Nonetheless, the newly independent state was virtually coerced to ratify the treaty by Bunau-Varilla, who employed alarmist tactics, including a warning that the U.S. would disavow its protection of Panama.

Even U.S. Treaty Negotiator and Secretary of State John Hay acknowledged in a letter to a Senator in 1904 that "the treaty was very advantageous to the U.S., and we must confess, with what we can muster, not so advantageous to Panama you and I know too well how many points there are in this treaty to which a Panamanian patriot could object." *Id.*, *New Treaties*, *supra* note 10, at 5; *Panama Canal Issues*, *supra* note 9, at 813.

[13] Bell, *supra* note 9, at 611.

[14] *New Treaties*, *supra* note 10, at 5; Linowitz Address, *supra* note 9, at 2-3; G. MOFFETT, *supra* note 10, at 20.

[15] For example, on Panamanian Independence Day in 1958, the U.S. flag was desecrated in the Canal Zone and U.S. citizens were attacked. *Panama Canal Issues*, *supra* note 9, at 15-20.

[16] Outraged by the flag agreement, American citizens living in the Canal Zone unsuccessfully challenged the agreement in U.S. Federal Court. *See* Doyle v. Fleming, 219 F Supp. 277 (D.C.C.Z. 1963). Subsequently, the Governor of the Canal Zone decreed that neither the U.S. nor the Panamanian flag would be flown at the four high schools in the Canal Zone. Resisting the decree, American students at Balboa High School raised the American flag. This, in turn, led to a series of riots as Panamanian students attempted to raise their own flag in the Canal Zone. Over twenty persons were killed in the clashes, and in excess of two million dollars in property damage was sustained. G. MOFFETT, *supra* note 10, at 28, 33-40; Bell, *supra* note 9, at 614-17.

[17] Bell, *supra* note 9, at 614.

[18] A Gallup poll commissioned after the 1964 flag riots found that among the 64%

in 1977 [19] The Panama Canal Treaty provides for the gradual transfer of the management and operation of the Canal to Panama by the year 2000. The Canal Zone will cease to exist, and Panama will assume general territorial jurisdiction over the Canal. The U.S. retains primary responsibility for the operation and defense of the Canal until the year 2000. The Neutrality Treaty obligates the U.S. and Panama to maintain the neutrality of the Canal to ensure that it remains open to vessels of all nations without discrimination.[20]

The U.S. Senate ratified the Treaties in 1978.[21] The ratification of the Treaties was greeted with virtually unanimous international approval. Latin American countries hoped the new treaties signalled an end to gunboat diplomacy and American imperialism.[22]

II. FACTUAL BACKGROUND

This section explains how Panama's *de facto* leader Manuel Noriega incurred the wrath of the Bush and Reagan administrations. Additionally, the means employed by the U.S. to remove Noriega from power are discussed.[23]

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of the U.S. population familiar with the issue, opposition to relinquishing control of the Canal was favored by a margin of six to one. G. MOFFETT, *supra* note 10, at 44.

[19] Though no reference was made to the actual text of the Treaties, a poll taken in 1977, prior to the U.S. Senate ratification debate, showed opposition to the Treaty among 78% of those familiar with the issue. Ronald Reagan focused national attention on the Canal during the 1976 presidential primaries when he proclaimed, "We built it, we paid for it, it's ours." Reagan's proclamation encapsulated the sentiments of many Americans whose frustrated nationalism, resulting from the retreat of America's preeminent power in the world after the Vietnam War, found expression in demands for the U.S. to maintain control over the Canal. The Canal represented a symbol "of a time when [Americans] did pretty much as [they] pleased." G. MOFFETT, *supra* note 10, at 11-12, 45.

[20] *See* Panama Canal Treaty, Sept. 7, 1977, United States-Panama, art. I(2)(3) 33 U.S.T. ____, ____, T.I.A.S. No. 10030, at ____, Panama Canal Permanent Neutrality Operation Treaty, Sept. 7, 1977, United States Panama, art. IV, 33 U.S.T. ____, ____, T.I.A.S. No. 10029, at ____

[21] Given the tremendous lack of public support for the Treaty, the Carter Administration launched a major public relations offensive to persuade lawmakers of the wisdom of the Treaties. Garnering sufficient support in the U.S. Senate for ratification was an uphill battle but was ultimately successful. Former Attorney General Griffin Bell provides a fascinating account of the ratification debate in the U.S. Senate and examines the constitutional issues raised by President Carter's negotiation of the treaties (e.g., whether the President and the Senate possess the power to make a treaty disposing of territory or property belonging to the U.S. without an Act of Congress). *See* Bell, *supra* note 9; *see also* G. MOFFETT, *supra* note 10, at 72-103.

[22] L.A. Times, Dec. 21, 1989, § B, at 6, col. 1.

[23] This information provides a useful basis for the discussion in section IV regarding how the framing of U.S. objectives in Panama (i.e., securing the removal of Noriega from power) was likely to lead to the unlawful action and ultimately lessened the influence of the law on the means chosen by the U.S. to achieve its objectives.

When the Treaties were ratified, Omar Torrijos was the ruler of Panama.[24] In 1981, Torrijos died in a mysterious plane crash. His intelligence chief, Manuel Antonio Noriega, gradually assumed control of the armed forces and emerged as *de facto* leader.[25]

Noriega's work with the C.I.A. guaranteed the support of several U.S. administrations. The Reagan administration initially chose to cast a blind eye toward accusations of drug trafficking by Noriega.[26] But U.S. support of Noriega became increasingly difficult as allegations of election fraud, drug trafficking, and murder of opponents gained prominence.[27] More significantly, Noriega lost favor with the Reagan administration when his duplicitous conduct toward the U.S. was discovered. While Noriega allowed U.S. backed Contras to train in Panama, he also allegedly provided arms to the Sandinistas and rebels in Colombia and El Salvador.[28] Noriega allegedly assisted the Cubans in obtaining high technology equipment for supply to the Soviet bloc.[29]

The Reagan administration apparently decided Noriega had to be removed from power. In late 1987, the Reagan administration began portraying Noriega as "a cocaine and steroid dealer who tortures and kills his enemies, has a craving for teenage girls and pals around with Colombian cartel goons. And he is ugly: a Quaddafi magnified, an Ayatollah with horns. "[30]

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[24] Torrijos seized power in a 1968 coup and ruled Panama as a dictator. G. MOFFETT, *supra* note 10, at 29.

[25] Some allege Noriega was involved in the death of Torrijos. Prior to his ascension to power, Noriega had ties to the U.S. Central Intelligence Agency. As early as the 1950's, Noriega was reportedly providing information to the U.S. about his colleagues at a military academy in Panama. Noriega later became a paid C.I.A. informant, assisting in U.S. intelligence-gathering in Latin America, particularly activities in Cuba. Noriega reportedly earned as much as $200,000 per year. It will probably take years to fully ascertain the nature and extent of Noriega's involvement with the C.I.A. The C.I.A. is likely to withhold potentially explosive information on its dealings with Noriega. Even the prosecutors working on the Noriega case in Florida have not been permitted to review the C.I.A. files on Noriega. Lacayo, *Noriega on Ice*, TIME, Jan. 15, 1990, at 24; Washington Post, Dec. 21, 1989, § A, at 36, col. 4.

[26] As late as 1987, the Reagan administration was asserting that Noriega had been "fully cooperative" with U.S. anti-drug efforts. Noriega received more awards from the Drug Enforcement Agency ("D.E.A.") than any other Latin leader. The D.E.A. continued to publicly defend Noriega while it procured evidence leading to his indictment. Church, *The Devil They Knew*, TIME, Jan. 15, 1990, at 28; L.A. Times, Dec. 22, 1989, § A, at 39, col. 2.

[27] Church, *supra* note 26, at 28.

[28] *Id.*

[29] *Id.*

[30] *Id.*

In February 1988, Noriega was indicted by a U.S. Federal Grand Jury in Florida for drug-trafficking and conspiracy to import large quantities of marijuana. As a result of the drug indictments, on February 25, 1988 President Del Valle of Panama dismissed Noriega from his post as Commander of the Panamanian Defense Forces [hereinafter P.D.F.]. The following day, President Del Valle was impeached during a session of the National Assembly dominated by Noriega sympathizers.[31]

The U.S. sought to negotiate Noriega's surrender of power by offering him asylum in a European country Noriega refused the offer.[32] Economic sanctions instituted by the Reagan administration in March 1988 also failed to achieve Noriega's surrender.[33] Continued mediation efforts by both Latin American leaders and the Organization of American States [hereinafter O.A.S.] also failed to secure Noriega's departure from power. The propaganda disseminated by the U.S. about Noriega forced the U.S. into a corner. One journalist commented:

> "The U.S. through two Administrations built Noriega into a menacing monster—instead of what he was, the tin-pot dictator of a not very important country—and put its credibility on the line by declaring he had to go. But everything Washington tried failed."[34]

In May 1989, Panama held national elections, which most foreign observers agreed the opposition won decisively The Noriega government annulled the election results, alleging outside interference. A pro-Noriega group called the Dignity Battalions

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[31] De Valle was replaced by Education Minister Manual Solis Palma. The U.S. continued to recognize De Valle as Panama's lawful President until his term expired on August 31, 1989. The U.S. also pressed the Noriega government to hold free and fair elections. L. Eagleburger, *The Case Against Panama's Noriega*, Address before the Panama Council of the Organization of American States, Washington, D.C. (Aug. 31, 1989), *reprinted in* Current Policy No. 1222, American Foreign Policy Current Documents.

[32] The U.S. sought to secure Noriega's departure from power beginning in late February 1988 and continuing through October 1989. *History of Diplomatic Efforts to Resolve the Panamanian Crisis*, STATE DEPT. DOC., no. 1815, 1-6 (Dec. 19, 1989).

[33] In December 1987, the U.S. Senate barred military and economic aid to Panama. In March 1988, President Reagan issued a declaration under the International Emergency Powers Act, freezing Panamanian government assets in the U.S. and barring payments to the Noriega regime of funds by U.S. citizens and companies. Approximately $300 million in payments were placed in escrow. Eagleburger, *supra* note 24, at 5-6.

[34] Church, *Showing Muscle*, TIME, Jan. 1, 1990, at 23.

attacked opposition leaders who were marching in protest of the annulment of the election.[35]

In October 1989, rebel troops within the P.D.F launched an unsuccessful coup that had the blessing, if not the actual logistical support, of the U.S.[36] After the coup attempt, tension between the U.S. and Panama escalated. The U.S. intensified its verbal attacks on Noriega, thereby further painting itself into a corner. In an August 31, 1989 address before the O.A.S., Deputy U.S. Secretary of State Eagleburger targeted Noriega as the primary factor responsible for the political crisis in Panama and the strained relations with the U.S..

> Nothing would please my government or the American people more than to end the measures currently in place and to re-establish normal relations with a democratic Panama. There is only one obstacle to resolving this crisis and we know who it is the problem is Noriega and, specifically, Noriega's willingness to put his personal interests and his personal gain above his colleagues in the Panama Defense Force, above his country, and above the international community in this hemisphere and the world.
>
> Noriega's greed, personal ambition, and selfishness are the origin, core, and sustenance of Panama's crisis. So long as he and those around him fail to recognize that reality, attempting to disguise it or deflect responsibility for it to others, the crisis will only worsen.
>
> In Panama the regime is aiding—giving refuge to—the narcotics traffickers, their front businesses, and the banks through which they launder their dirty money
>
> The writing is on the wall. The pattern is clear. Indifference to the voluminous evidence can only give license and encouragement to Noriega and his kind.
>
> The evasions, the posturings, the propaganda parading as truth—all that Noriega's defenders have put forward to keep this criminal in power have been exposed. Noriega's actions are inexcusable.
>
> But our inaction would be inexcusable. This is no time for silence. This is no time for timidity We must see Noriega for who he is.

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[35] The Organization of American States condemned "the grave events and the abuses by General Manuel Antonio Noriega in the crisis and the electoral process in Panama." *The Case Against Panama's Noriega*, *supra* note 31, at 5; Smolowe, *Panama's Would-Be President*, TIME, Jan. 1, 1990, at 30.

[36] L.A. Times, Dec. 20, 1989, § A, at 7, col. 4.

> Columbia and Panama. Barco and Noriega. Could we have a starker comparison of the moral qualities of the best and worst among us in our hemisphere? Which one deserves our help; which one deserves to be purged, to be driven from our midst? For the United States, at least, the answer is clear. Barco si, Noriega No![37]

On December 15, 1989, the Noriega controlled Panamanian National Assembly passed a resolution declaring the country to be in a state of war with the U.S. as long as U.S. economic sanctions remained in place.[38]

On December 16, 1989, a U.S. Marine was shot and killed by a member of the P.D.F [39] In a separate incident on the same day, a Navy lieutenant and his wife were near the P.D.F headquarters when they were taken to an undisclosed location by intoxicated P.D.F. soldiers and interrogated for four hours. The lieutenant allegedly was kicked and his wife threatened with rape.[40]

On December 20, 1989, the U.S. launched a full scale invasion of Panama and effectively toppled the Noriega regime. The same day, the freely elected leaders of Panama, President Endara and Vice Presidents Calderon and Ford assumed the leadership of Panama.

The U.S. invasion resulted in the loss of twenty-six American and at least 700 Panamanian lives and a tremendous amount of property damage.[41] U.S. invasion forces remained in Panama for over one month after the invasion.[42]

After seeking refuge in the Vatican Embassy in Panama City for over a week, Noriega left the embassy compound and was apprehended by U.S. authorities for a trial on drug-trafficking charges in the United States. Noriega is currently in custody in Florida awaiting trial.[43]

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[37] *The Case Against Panama's Noriega*, *supra* note 31, at 6.

[38] One journalist has suggested that Noriega's declaration of war was designed to consolidate his shrinking base of popular support and revive his beleaguered 16,000 member armed forces. Washington Post, Dec. 20, 1989, § A, at 33, col. 1.

[39] *U.S. Officer Killed After Panama Declares War*, GUARDIAN WEEKLY, Dec. 24, 1989, at 15; L.A. Times, Dec. 21, 1989, § B, at 31, col. 1; Washington Post, Dec. 21, 1989, § A, at 31, col. 1.

[40] Washington Post, *supra* note 38; Pincus, *Pair of Incidents Pushed Bush Toward Invasion*, Washington Post, Dec. 21, 1989, § A, at 16, col. 1 [hereinafter *Pair of Incidents*]; Washington Post, Dec. 21, 1989, § A, at 31, col. 5; *infra* note 68.

[41] Nanda, *supra* note 1, at 494.

[42] *Id.*

[43] *Id.*

III. JUSTIFICATIONS FOR THE INVASION

A. Introduction

The Bush Administration presented four justifications for the invasion: protecting American lives, maintaining the integrity of the Panama Canal Treaties, restoring democracy in Panama, and bringing Noriega to justice. As a possible fifth justification, the U.S. alleged that it had consulted with the democratically elected leadership of Panama, who welcomed the invasion. This section establishes the illegality of each of the justifications proffered by the U.S. under even the most generous reading of the facts presented. It is important to understand the legal weaknesses of each of the justifications, in order to fully appreciate the discussion in section IV regarding the attempt by the United States to justify its unlawful action, or at least to temper the reaction of the international community, by focusing on the context in which the U.S. action was taken and emphasizing the drug trafficking activities of Noriega and his interference with democratic process.

B. The Law of Humanitarian Intervention

The U.S. asserted that its action, taken to protect American lives, was justified under the doctrine of humanitarian intervention. This section outlines the pre-U.N. Charter law on humanitarian intervention. The great divergence of opinion among states and legal scholars on the impact of the U.N. Charter on the law of humanitarian intervention is discussed. The legality of the U.S. invasion is tested under each of these varying interpretations.

Under pre-U.N. Charter customary international law, states had the right to use force to protect their nationals abroad. However, states could only exercise this right in limited circumstances. The position outlined by U.S. Secretary of State Daniel Webster in a diplomatic letter to the British in 1842 is commonly accepted as reflective of the boundaries within which the use of force may be legitimately exercised under customary international law [44] Webster stated:

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[44] The letter was written in response to a British claim of a legal right to attack the vessel Carolina on the American side of the Niagara River on the basis that the vessel carried armed men intending to use force to assist an insurrection in Canada. Secretary Webster rejected any such right under the facts presented by the British. *See* J. GOLDEN, THE USE OF FORCE IN INTERNATIONAL RELATIONS 201 (1974); W GILMORE, THE GRENADA INTERVENTION 49 (1984).

> It will be for [her Majesty's] Government to show a necessity of self-defense, instant, overwhelming, leaving no choice of means, and no moment for deliberation. It will be for it to show, also, that the local authorities of Canada—even supposing the necessity of the moment authorized them to enter the territories of the United States at all—did nothing unreasonable or excessive; since the act justified by the necessity of self-defense, must be limited by that necessity, and kept clearly within it. [45]

After the adoption of the U.N. Charter, Sir Humphrey Waldock tailored Webster's test to suit circumstances involving the protection of nationals abroad:

> There must be (1) an imminent threat of injury to nationals, (2) a failure or inability on the part of the territorial sovereign to protect them and (3) measures of protection strictly confined to the object of protecting them against injury Even under customary law only an absolute necessity could justify an intervention to protect nationals.[46]

There is some dispute as to whether the customary international law right of self-defense to protect nationals abroad survives the U.N. Charter. The United Nations Charter exhorts member states to settle all disputes by peaceful means and to refrain from the use of force in their relations with other states. The general prohibition on the use of force is contained in article 2(4) of the U.N. Charter, which states the following:

> All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any State, or in any other manner inconsistent with the Purposes of the United Nations.[47]

The broad prohibition on the use of force is subject to two explicit exceptions: individual or collective self-defense, and armed action by the U.N. Security Council as an enforcement measure.[48]

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[45] Excerpts reprinted in W GILMORE, *supra* note 44, at 49.

[46] E. HOYT, LAW AND FOREIGN POLICY 216-17 (1985). States asserting a right of humanitarian intervention have in some cases relied upon Webster's general test of the customary international law right of self-defense and in other instances upon the criteria set forth by Sir Humphrey Waldock. For example, during the Security Council debates on the Entebbe raid, Israel stated that its action complied with Webster's test. The U.S. on the other hand, relied on Sir Humphrey Waldock's formula in defending the Israeli action. *See infra* notes 59, 66.

[47] U.N. CHARTER art. 2(4).

[48] *See* U.N. CHARTER art. 51; Schachter, *The Right of States to Use Armed Force*, 82 MICH. L. REV. 1620, 1620 (1984).

The use of force in individual or collective self-defense is allowed under article 51 of the U.N. Charter, which states in relevant part,

> Nothing in the present Charter shall impair the inherent right of individual or collective self-defense if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace. [49]

There is a great divergence of opinion among states and legal scholars on the exact meaning and application of article 51 of the U.N. Charter. Most states and some commentators reason that the qualifying words, "if an armed attack occurs," strictly limits the right of self-defense to instances where a prior armed attack against the geographical territory of the State has occurred.[50] Under this interpretation, the customary international law right of self-defense to protect nationals abroad does not survive the U.N. Charter,[51] and the use of force by a state to protect its nationals abroad is prohibited by article 51.[52] Other states and some commentators maintain that the use of the word "inherent" in article 51 recognizes and preserves the pre-U.N. Charter customary international law right of self-defense to protect one's nationals abroad.[53] The

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[49] U.N. CHARTER art. 51.

[50] *See* D'Angelo, *Resort to Force by States to Protect Nationals: The U.S. Rescue Mission to Iran and its Legality Under International Law*, 21 VA. J. INT'L L. 485, 487-490 (1981) (stating that the majority of U.N. members adopt this restrictive reading of article 51 due to a concern that the parameters of the customary international law right of self-defense are not clearly delineated, resulting in the potential gradual erosion of all restraints on the use of force).

[51] I. BROWNLIE, INTERNATIONAL LAW AND THE USE OF FORCE BY STATES 268 (1963); Fairley, *State Actors, Humanitarian Intervention and International Law: Reopening Pandora's Box*, 10 GA. J. INT'L L. 29, 33 (1980).

[52] T. FRANCK & E. WEISBAND, WORLD POLITICS: VERBAL STRATEGY AMONG THE SUPERPOWERS 75 (1971); J. STONE, AGGRESSION AND WORLD ORDER: A CRITIQUE OF UNITED NATIONS THEORIES OF AGGRESSION 41 (1958); D'Angelo, *supra* note 50, at 490-93, 496, 517.

[53] A third group of commentators, such as Lillich and Moore, contend that the pre-Charter customary international law right of self-defense is activated only if the Security Council is unsuccessful in resolving the dispute. Both of these legal scholars have set forth a number of factors to be considered in assessing the lawfulness of particular armed action to protect nationals abroad. These factors extend beyond the three criteria laid down by Sir Humphrey Waldock in establishing the parameters within which forcible armed intervention may be legitimately exercised to rescue nationals under customary international law. *See* Lillich, *Forcible Self-Help by States to Protect Human Rights*, 53 IOWA L. REV 325, 349-51 (1967); Moore, *The Control of Foreign Intervention in Internal Conflict*, 9 VA. J.

two interpretations of article 51 reflect different policy considerations.[54] The remarks made by various states during the Security Council debates on the 1976 Israeli raid on Entebbe illustrate the policy considerations underlying the various interpretations.

In theory, the doctrine of intervention to protect nationals abroad is appealing because it enables states to take action to protect their nationals and not have to stand by idly and witness the murder of their citizens in foreign countries.[55] In defending the raid on Entebbe to rescue Israeli nationals taken hostage by international terrorists, the Israeli representative to the Security Council asserted that the customary international law right of self-defense to protect nationals survived the U.N. Charter. He also made an impassioned plea for the need to recognize human freedom over national sovereignty:

> Had a Jewish state existed in the 1930's, we might well have decided, with the rise of Nazism, to endeavour to undertake an operation to rescue the inmates of the concentration camps. The

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INT'L L. 205, 262-64 (1969).

The United States, Great Britain, Israel, and Belgium contend that the customary right of self-defense to protect its nationals abroad survived the U.N. Charter. In the *Nicaragua* case, the International Court of Justice [hereinafter ICJ] had occasion to consider the status of the customary international law right of self-defense vis a vis the U.N. Charter. Ironically, in the *Nicaragua* case, the U.S. adopted a view apparently at variance with its usual position that the customary international law right of self-defense survived the U.N. Charter. The U.S. requested the Court to refrain from applying the rules of customary international law to its dispute with Nicaragua because these rules have been subsumed and supervened principally by the U.N. Charter. The ICJ held that the customary international law right of self-defense coexists with the U.N. Charter:

> Article 51 of the Charter is only meaningful on the basis that there is a 'natural' or 'inherent' right of self-defense, and it is hard to see how this can be other than of a customary nature, even if its present content has been confirmed and influenced by the Charter. Moreover, the Charter, having itself recognized the existence of this right, does not go on to regulate directly all aspects of its content. For example, it does not contain any specific rule whereby self-defense would warrant only measures which are proportional to the armed attack and necessary to respond to it, a rule well established in customary international law. Moreover, a definition of armed attack which, if found to exist, authorizes the exercise of the inherent right of self-defense, is not provided in the Charter, and is not part of treaty law.

Although the ICJ recognized that the customary international law right of self-defense coexists with the U.N. Charter, the court specifically expressed no view on the lawfulness of an armed response to the imminent threat of an armed attack because the issue was not raised by the parties to the *Nicaragua* case. D'Angelo, *supra* note 50, at 498; Concerning Military and Paramilitary Activities in and Against Nicaragua (U.S. v. Nicaragua) 1986 I.C.J. 17-18, 84 (June 27, 1986).

[54] D'Angelo, *supra* note 50, at 486-500.

[55] *See* Lillich, *supra* note 53, at 344.

> logic of those who criticize us today would maintain that by so doing we would be in flagrant violation of the national sovereignty of the Third Reich. What would have been more important: Hitler's sovereignty or rescuing innocent people from a holocaust?[56]

Some states have and will continue to rely upon the doctrine of humanitarian intervention to justify armed action allegedly designed to protect their nationals abroad. For this reason, some commentators suggest that the international rules regulating the use of force should reflect the practice of states. Jean Raby argues forcefully for a legal regime permitting the use of force to protect nationals abroad:

> [I]n the end the overriding concern is to bring international law closer to the reality of the international community
>
> It cannot be denied that states do use force to protect nationals; and that they do it because they have no other choice. This is not to say that prohibition of the use of force in Article 2(4) of the Charter is a dead letter. It must be recognized, however, that the whole system of regulation of the use of force set up by the Charter is shaky. Maintaining an idealistic vision of a contemporary world ruled by a legal order prohibiting all unilateral recourse to forceful coercion will not restore its strength.
>
> International law can play a crucial role in fulfillment of the objective of peace and harmony between nations, by setting up rules that represent ways to attain it. One does not, however, strengthen the international legal order by establishing rules whose content is so abstract that they become mere ideals, ideals to which states will pay lipservice but which do not take into account the behavior of the international community By maintaining that a unilateral use of force is prohibited, the Charter system and the whole body of international law is and will be brought into dispute. [57]
>
> International law, and the international community in general, will be better served by a legal regime of the use of force that allows for unilateral use of armed coercion in certain well-defined exceptional situations. This regime would correspond more to the present needs of the international community and would enhance respect for the rule of law [58]

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[56] 31 U.N. SCOR (1939th mtg.) at 14, U.N. Doc. S/PV 1939 (1976).

[57] Raby, *The State of Necessity and the Use of Force to Protect Nationals*, 1988 CANADIAN YRBK. INT'L L. 253, 271.

[58] *Id.* (quoting J. STONE, OF LAW AND NATIONS 36-37).

Creating a legal regime that reflects the practice of states, as Raby suggests, could result in the eventual disintegration of the general prohibition on the use of force. Each justification, if proffered consistently over a period of time, would theoretically, according to Raby's reasoning, be reflected in the international rules regulating the use of force. Over time, so many exceptions to Article 2(4) could be created that the exceptions could become the rules and the rule the exception. Expressing just such a concern, the Tanzanian Representative implied in his remarks to the U.N. Security Council that upholding the rule of law was more important than recognizing exceptions that would serve only to weaken the purpose of the rule—maintaining peace:

> If we condone lawlessness and disrespect for all that the international community has held so dear, we shall be saying that the Charter and what it stands for does not mean much. We shall, in fact, be saying that we can always make exceptions depending on how circumstances suit our own interests.
>
> The Israeli military action at Entebbe cannot be taken lightly It is a dangerous precedent which, if allowed to go uncontested, could usher in a new era in international relations, an era of lawlessness. We must speak against the danger of allowing a precedent of this nature to go uncontested. We must speak in such terms because either we have international law we all respect, either we have a U.N. [Charter] to which we all adhere, or we do not. If you make one exception, then exceptions become the rule.[59]

Some states, unwilling to support the doctrine of humanitarian intervention, have noted that a rescue mission may cause chaos and destruction and result in the loss of the very lives the mission was designed to save. These factors were cited by the representatives of several states during the Security Council debates on Entebbe. More than one hundred officers and men of the Ugandan army were killed during the Israeli raid on Entebbe as were several Israeli hostages. In addition, some Ugandan military and civilian aircraft were destroyed.[60] The Tanzanian representative stated,

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[59] 31 U.N. SCOR (1941st mtg.) at 11, U.N. Doc. S/PV 1941 (1976) [hereinafter U.N. Doc. S/PV 1941].

[60] 31 U.N. SCOR (1939th mtg.) at 23, U.N. Doc. S/PV 1939 (1976) [hereinafter U.N. Doc. S/PV 1939]. Several of the delegations discounted the significance of the loss in Ugandan military personnel and aircraft because there was some evidence to suggest that Uganda's leader Idi Amin had collaborated with the terrorists.

> [I]f we are determined to save hostages from hijackers—a determination we all share—we must equally be concerned at the senseless loss of life inflicted upon the Ugandans. And not only upon the Ugandans. In a sense, the Israeli action also led to the killing of some of the very hostages the Israeli government attempted to save. [61]

There is tension between the factors that favor a right of humanitarian intervention and the factors that argue against such a right. The Representative from Great Britain explained the dilemma posed by these conflicting considerations:

> [The] debate . involves questions that affect us all. On the one hand, there is the principle of territorial integrity; on the other hand, there is the equally valid consideration that States exist for the protection of their peoples, and they have the right, perhaps, the duty, to exercise that right [62]

The different positions concerning the impact of the U.N. Charter on the customary international law right of self-defense to protect nationals reflect the relative weight placed on competing policy considerations. These conflicting considerations are not easily resolved. The U.S. invasion of Panama is unlawful under both restrictive and expansive interpretations of article 51 and tends to prove the risks associated with recognizing a right of humanitarian intervention under the U.N. Charter

1. *Protecting U.S. Nationals in Panama*

The facts relied upon by the U.S. to justify its action as a measure designed to protect American lives, as well as the actual circumstances of the invasion, fail to comply with even an expansive reading of article 51. No imminent threat to U.S. nationals in Panama existed, and the military actions were not strictly confined to removing U.S. nationals from danger.

In a December 20th address to the nation, President Bush outlined the facts allegedly justifying the U.S. action to protect its nationals in Panama:

> Last Friday, Noriega declared his military dictatorship to be in a state of war with the United States and publicly threatened the lives of Americans in Panama. The very next day, forces

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[61] U.N. Doc. S/PV 1941, *supra* note 59.

[62] U.N. Doc. S/PV 1939, *supra* note 56, at 13.

> under his command shot and killed an unarmed American serviceman, wounded another, arrested and brutally beat a third American serviceman, and then brutally interrogated his wife, threatening her with sexual abuse.
>
> That was enough.
>
> General Noriega's reckless threats and attacks upon Americans in Panama created an imminent danger to the 35,000 American citizens in Panama.
>
> I took this action only after reaching the conclusion that every other avenue was closed and the lives of American citizens were in grave danger. [63]

To bolster U.S. claims that the lives of Americans were in imminent danger, U.S. Secretary of State James Baker alluded to the existence of an unsubstantiated intelligence report about a planned attack on American citizens:

> [A]fter the President had made his decision he received an intelligence report that General Noriega was considering launching an urban commando attack on American citizens in a residential

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[63] Press Statement by President George Bush (Dec. 20, 1989). There is some uncertainty surrounding the factual claims made by President Bush. For example, the precise circumstances of the incident involving the shooting of the American marine are in dispute. The U.S. asserted that four off-duty U.S. officers were driving when they made a wrong turn and found themselves in front of the headquarters of the P.D.F They were allegedly forced to stop the car by approximately 40 civilians and 5 or 6 uniformed P.D.F soldiers. The crowd tried to pull the Americans out of the car, whereupon the servicemen drove off. Shots were fired at the fleeing car killing one American.

Panamanian sources claimed the 4 men broke through P.D.F checkpoints and opened fire on Noriega's headquarters, wounding 3 Panamanians. One of the allegedly wounded Panamanians later confirmed he was shot by a stray bullet near P.D.F headquarters. The grandmother of one of the other civilians allegedly wounded stated that her grand-daughter was actually hit by a stray bullet 4 miles away from P.D.F headquarters. GUARDIAN WEEKLY, *supra* note 39.

U.S. officials in Panama stated that the American serviceman who was beaten and whose wife was threatened was not available for an interview. President Bush failed to mention that a Panamanian policeman was also wounded by a U.S. lieutenant on December 16, 1989. The U.S. officer was leaving a laundry near the headquarters of the U.S. Southern Military Command when he was approached by a uniformed Panamanian who signalled the serviceman to stop and then approached him. Feeling threatened, the serviceman reached for his gun and fired two shots. The U.S. Pentagon acknowledged that the lieutenant was in civilian clothes and was not authorized to carry a weapon. Pineus, *supra* note 40; *see also* Washington Post, Dec. 19, 1989, § A, at 16, col. 4; Washington Post, Dec. 20, 1989, § A, at 32, col. 1. Understandably, many view with suspicion legal arguments advanced by countries because "states in substantiating their claims, frequently seem to cite carefully chosen, if not fabricated, sets of facts. Thus, the legal justifications offered by states are often perceived as rationalizations contrived after the decision to intervene has been made." Schachter, *In Defense of International Rules on the Use of Force*, 53 CHI. L.R. 113, 119 (1986).

> neighborhood. I cannot prove to you that this report was absolutely reliable, but I do know that if the President had failed to act as he did and Noriega's dignity battalions had killed and terrorized a dozen American families in Panama, you would be asking us today why didn't you act to prevent this kind of violence against our citizens.[64]

Baker's reference to this unsubstantiated intelligence report reflects one of the dilemmas faced in assessing the propriety of a particular state's action under international law; the international community is often confronted with an avalanche of information or disinformation from questionable sources.[65]

It is impossible to harmonize the facts relied upon by the U.S. as well as the circumstances of the actual invasion with either a restrictive or expansive reading of article 51. Under a restrictive view, the U.S. invasion of Panama was clearly violative of article 51 because it was not preceded by an armed attack by the Republic of Panama on the territory of the U.S. An expansive reading of article 51 recognizes the pre-Charter customary international law right of self-defense. The U.S. action cannot be reconciled with the three conditions enumerated by Sir Humphrey Waldock and previously accepted by the U.S. as indicative of the customary international law right of self-defense.[66] No imminent threat to U.S. nationals in Panama existed. The declaration of war by the Panamanian National Assembly was not in itself sufficient to constitute an imminent threat to the 35,000 Americans living in Panama. As Dinstein aptly points out, "The notion that mere mobilization or 'bellicose utterances' as such may justify self-defence within the framework of Article 51, has no foundation."[67]

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[64] Press Conference by U.S. Secretary of State James Baker, Dec. 20, 1989.

[65] Y. DINSTEIN, WAR, AGGRESSION AND SELF-DEFENSE 177 (1988).

[66] In defending the legality of the Israeli rescue mission at Entebbe, U.S. ambassador Scranton reiterated the three conditions enumerated by Sir Humphrey Waldock:

> Israel's action in rescuing hostages necessarily involved a temporary breach of the territorial integrity of Uganda. Normally, such a breach would be impermissible under the Charter of the U.N. However, [t]here is a well-established right to use limited force for the protection of one's own nationals from an imminent threat of injury or death in a situation where the state in whose territory they are located is either unwilling or unable to protect them. The right, flowing from the right of self-defense, is limited to such use of force as is necessary and appropriate to protect threatened nationals from injury.

U.N. Doc. S/PV 1941, *supra* note 59, at 8.

[67] Y. DINSTEIN, *supra* note 65, at 173-74.

The U.S. provided factual evidence on only two unrelated incidents. After the murder of the U.S. Marine, the Panamanian military attempted to reassure the U.S. that the incident was isolated and unintended.[68] After being briefed by the Bush Administration on the two incidents relied upon as justifying the U.S. action, one member of Congress stated the following: "The December 16 incidents were the excuse and not the reason for the invasion."[69]

The U.S. action was not strictly confined to removing U.S. citizens from danger. A massive invasion force was not necessary to protect American lives. Indeed, the invasion had a destructive impact on civilian population centers in Panama City [70] Furthermore, the action placed Americans in Panama in greater peril than they had been prior to the invasion, as is reflected in the number of casualties.[71] A less intrusive alternative could have been chosen, such as the evacuation of Americans on the isthmus to U.S. military bases. Such an option would have represented a more proportional response to the isolated incidents and unsubstantiated intelligence reports.[72]

The U.S. action constituted an attack against the existing governmental leadership in Panama. The Endara government's representative to the U.N. affirmed that the invasion was aimed at the Noriega regime.[73] Although a carefully circumscribed rescue mission might not violate article 2(4), a large scale invasion to protect nationals or to overthrow a tyrannical regime violates the territorial integrity and political independence of the State by infringing upon the right of the state to control access to its territory and to determine the makeup of its political leadership free from outside interference. Even commentators who contend that the customary international law right to protect nationals abroad survived the U.N. Charter concede that the military operation must be carefully

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[68] N.Y. Times, Dec. 19, 1989, § A, at 19, col. 5.

[69] Pineus, *supra* note 40, at 16.

[70] One journalist asserted that residential apartment buildings sustained a great deal of damage from Apache helicopters used during the invasion. Over 400 bombs landed on Panama City in 13 hours. *See* N.Y. Times, June 18, 1990, § A, at 21, col. 5; Washington Post, Dec. 23, 1989, § A, at 19, col. 5.

[71] Security Council Resolutions declaring the use of force illegal in a given situation note the much higher number of casualties resulting from the defense in relation to the attack. *See* Schachter, *supra* note 48, at 1637.

[72] L.A. Times, Dec. 21, 1989, § B, at 7, col. 4.

[73] 44 U.N. GAOR (88th Plenary Mtg.), Doc. 7976 (1989) [hereinafter U.N. Doc. 7976].

limited to protecting nationals, not attacking the leadership of the existing government.[74]

The purported legal justification cited by the Bush administration fails to withstand scrutiny even under an expansive reading of article 51, recognizing the pre-Charter customary international law right of self-defense. The U.S. failed to establish any imminent threat to American nationals in Panama or establish that Panama was unable or unwilling to protect American nationals. Finally, the invasion itself was not limited to protecting U.S. nationals.

The reaction of the international community supports the view that the U.S. action is indefensible under article 51 of the U.N. Charter Although the U.S., Great Britain, and France vetoed a draft Security Council Resolution that deplored the U.S. invasion,[75] the majority of U.N. members voted in favor of a resolution strongly deploring the intervention in Panama as a flagrant viola-

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[74] *See* Schachter, *The Legality of Pro-Democratic Invasion*, 78 AM. J. INT'L L. 645, 649 (1984).

[75] Under the draft resolution, the Security Council would have demanded the immediate cessation of the United States intervention in Panama and the withdrawal of its forces. The Council also would have strongly deplored the intervention as a flagrant violation of international law and of the independence, sovereignty, and territorial integrity of States. The Secretary-General also would have been requested to monitor developments in Panama and to report back to the Council within 24 hours.

The representatives of Senegal, the U.S., and Colombia made statements to the Security Council and statements in explanation of vote on the Security Council resolution were made by representatives of Finland, France, the United Kingdom, and the Soviet Union.

The representative of Senegal emphasized that states must avoid resorting to force, and his country could not endorse an action that undermined the very foundations of international relations. Colombia acknowledged that the de facto government of Panama had prevented the free expression of Panamanian will. Nevertheless, Colombia deplored the U.S. intervention on the basis that Panamanians had the right to determine their fate without internal or external meddling.

Ten countries voted in favor of the resolution, four against (Canada, France, United Kingdom, and the U.S.), with one abstention (Finland).

Finland abstained because it felt a more specific reference should have been made to the right of the Panamanian people to democracy. France opposed the draft resolution as it was too unbalanced and might imply support for a regime that France thought illegitimate. In France's view, a balanced resolution would have included a statement expressing regret for the interruption of the democratic process in Panama.

The U.K. also voted against the resolution because of its unbalanced nature. The U.K representative said the Security Council should welcome the establishment of democracy in Panama. The draft failed to acknowledge the long history of the Noriega regime's violence against U.S. personnel and that the U.S. used force only as a last resort.

In explaining its vote in favor of the resolution, the U.S.S.R. condemned the U.S. invasion as a flagrant violation of international law. The Soviet representative stated that the U.S. action gave rise to cynicism because "democracy could not be brought in on the point of a bayonet." 44 U.N. SCOR (2902nd mtg.) at 6820-27, U.N. Doc. Sc. 5155 (1989).

tion of international law and of the independence, sovereignty, and territorial integrity of States.[76] Although General Assembly Resolutions are not binding under the U.N. Charter and are often influenced by political considerations, such decisions do express the collective consensus of the international community They may be regarded as interpretative evidence of legal obligation, particularly when states friendly to the intervening state are convinced that the action constitutes a violation of the U.N. Charter.[77] Many states friendly to the United States, including Barbados, Brazil, Haiti, Australia, Colombia, and Mexico, voted in favor of the General Assembly Resolution.[78] No member of the United Nations, apart from the U.S., stated that the action was defensible under article 51 of the U.N. Charter.

The U.S. intervention in Panama lends support to those who argue that strict constructions of articles 2(4) and 51 are necessary in order to limit the temptation to rely on humanitarian intervention as a pretext for intervention to advance other aims. As Fairley observes, "A history of black intentions clothed in white has

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[76] The resolution recalled article 2(4) of the Charter and reaffirmed the need to restore conditions that would guarantee the full exercise of the human rights and fundamental freedoms of the Panamanian people. The resolution also reaffirmed the sovereign and inalienable right of Panama to determine freely its social, economic, and political system and to develop its international relations without any forms of foreign intervention, interference, coercion, or threat. The resolution demanded the immediate cessation of the U.S. intervention and the withdrawal from Panama of the armed invasion forces of the U.S.

Statements were made in the General Assembly by the representatives of China, Mexico, Ukraine, Albania, Colombia, the U.S., and Panama. Putting aside the U.S. and Panamanian remarks, these statements reveal that many countries discounted the justifications advanced for the invasion.

The representative from China stated that the U.S. made a mockery of sovereignty and human rights by asserting it had intervened in Panama to restore democracy and to defend itself. Mexico's representative stated that drug trafficking should not provoke an action such as that undertaken by the U.S. in Panama. The Ukraine representative stated that the U.S. action symbolized the discredited policy of "might makes right." Not surprisingly, Albania leveled perhaps the most stinging criticism against the U.S. action. The Albanian delegate said no pretext could justify the U.S. action. He condemned the aggression as a flagrant instance of brutal interference in an independent and sovereign state. The U.S. action had proven once again that the super-power's expressed intention to strive for international peace and security remains sheer rhetoric.

75 states voted in favor of the resolution, 40 abstained and 20 voted against the resolution. U.N. Doc. 7976, *supra* note 73, at 6820-27.

[77] *See* Schachter, *supra* note 48, at 1620-22; *see generally* Schachter, *Self Defense and the Rule of Law*, 83 AM. J. INT'L L. 261-62 (1989).

[78] N.Y. Times, Dec. 22, 1989, § A, at 20, col. 3; U.N. Doc. 7976, *supra* note 73, at 6820-27.

tainted the most possible applications of the doctrine of [humanitarian intervention]."[79]

Fairley's quote has particular relevance to the U.S. invasion of Panama. The U.S. meticulously chose the doctrine of humanitarian intervention to persuade other countries to accept its action. It presented as many facts as possible in an attempt to lend credibility to the application of the doctrine to its action. Yet, as the above analysis has shown, the U.S. relied upon this doctrine in an attempt to mask an intervention aimed at changing the existing governmental structure in Panama.

2. *Legality Under the O.A.S. Charter*

As an additional defense, the U.S. asserted that its action was in conformity with the O.A.S. Charter. The U.S. action cannot be defended under the O.A.S. Charter for three reasons. First, the circumstances preceding the invasion did not impede the ability of the U.S. to discharge its obligations under the Panama Canal Treaty Second, even if the situation prior to the invasion did limit the U.S.'s ability to carry out its obligations, the U.S. action was not defensible because it was not exercised in conformity with the U.N. Charter. Third, the U.S. action conflicts with the nonintervention principle codified in the O.A.S. Charter.

The U.S. made a conclusory assertion that the use of force in protecting American lives in Panama was permissible under article 21 of the O.A.S. Charter.[80] "The American states bind themselves in their international relations not to have recourse to the use of force, except in the case of self-defense in accordance with existing treaties or in fulfillment thereof."[81]

The right of self-defense is allowed under the O.A.S. Charter "in accordance with existing treaties or in fulfillment thereof."[82] The U.S. argued that it had a right to protect its nationals performing U.S. functions under the Panama Canal treaty to enable the U.S. to fulfill its obligations under that treaty This argument suggests that widescale attacks against American personnel in Panama are tantamount to an attack against the U.S. if such attacks significantly impair the ability of the U.S. to carry out its respon-

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[79] Fairley, *supra* note 51, at 63.

[80] L. Einaudi, Remarks to Organization of American States (Dec. 22, 1989) *reprinted in Panama: A Just Cause* U.S. Dept. of State Current Policy Doc. no. 1240, 3.

[81] O.A.S. CHARTER (Revised) ch. III, art. 21, para. 1.

[82] *Id.*

sibilities under the Panama Canal Treaty. The issue would then be under what circumstances would the U.S. be able to exercise force in self-defense to fulfill its obligations under the Panama Canal Treaty. Isolated incidents against American nationals in Panama should not activate the right to resort to the use of force in self-defense. The attacks would have to be sufficiently widespread to impair the ability of the U.S. to maintain, improve, protect, and defend the Canal. Only in such circumstances could a nexus be drawn between attacks against U.S. nationals and an attack against the U.S. as a party striving to fulfill its obligations under the Panama Canal Treaty.

The U.S. made no such showing. Instead, the U.S. ambassador to the U.N., Thomas R. Pickering, stated to the U.N. Security Council that for two years preceding the invasion the Noriega regime engaged in a systematic campaign to harass and intimidate U.S. and Panamanian employees of the Panama Canal Commission.[83] As factual support for this claim, the State Department alleged in a conclusory and vague manner 300 violations of U.S. military bases by P.D.F personnel, 400 instances of detention of U.S. personnel, and 140 instances of endangerment to U.S. personnel.[84] Yet, canal operations were never interrupted, and the Canal was never forced to close prior to the invasion. More importantly, Michael A. Kozak, U.S. Deputy Assistant Secretary of State for Inter-American Affairs, made a statement on November 2, 1989, conceding that Noriega sought to avoid any direct threat to Canal operations or the exercise of U.S. rights under the Panama Canal Treaty:

> Clearly, the political crisis in Panama which began in the summer of 1987 has severely strained our ability to work with Panama on matters of mutual interest, including the Canal relationship. But neither the United States nor the treaties themselves have become the issue. Despite a constant stream of disinformation and unsubstantiated charges about U.S. treaty violations, the regime has been careful not to attack or disown the treaties.
>
> Despite regime efforts to change U.S. nonrecognition policy by harassing U.S. and Panamanian employees of the U.S. forces and the Panama Canal Commission, *Noriega has seemingly sought*

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[83] T. Pickering, Remarks to UN Security Council (Dec. 20, 1989) *reprinted in Panama: A Just Cause*, U.S. Dept. of State Current Policy Doc. no. 1240, 1-2.

[84] *Panama: International Legal Justifications*, STATE DEPT. DOC. No. TFMP 02-408337-4670 (1989).

> *to avoid any direct threat to the canal or a direct challenge to the proper exercise of U.S. rights.* [85]

In his December 20th statement to the U.N. Security Council, Pickering acknowledged that the U.S. ability to ensure unimpeded transit of vessels was not obstructed:

> Even during the Noriega regime's illegal seizure of power, the United States has continued to do what it has done since the entry into force of the treaty a decade ago—providing for the safe and orderly transit of vessels through the canal while assuring increasing Panamanian participation in its management and operation.[86]

Even if the factual circumstances warranted U.S. action in self-defense, the exercise of any such right must be consonant with the provisions of the U.N. Charter Such an interpretation is supported by article 21 of the O.A.S. Charter. The language of article 21 states that the right of self-defense must be exercised "in accordance with existing treaties," implying *all* treaties to which the U.S. and Panama are parties, including the U.N. Charter.

Article 137 of the revised O.A.S. Charter specifically stipulates that, "None of the provisions of this Charter shall be construed as impairing the rights and obligations of the Member States under the Charter of the United Nations."[87] Any right of the U.S. to protect its nationals in Panama must be exercised in harmony with articles 2(4) and 51 of the U.N. Charter. Under the predominant interpretations of these two U.N. provisions, the facts relied upon by the U.S. in defending its action ultimately fail to withstand legal scrutiny.

Although the U.S. generally asserted that its action was justified under article 21 of the O.A.S. Charter, other crucial provisions of that instrument were not mentioned. Article 21 cannot be read in isolation and must be interpreted in conjunction with articles 18 and 20 of the revised O.A.S. Charter.

Article 18 of the O.A.S. Charter contains a blanket prohibition on intervention, including the use of armed force:

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[85] Panama Canal: The Strategic Dimension, Hearing Before the Subcomm. on Panama Canal and Outer Continental Shelf of the House Committee on Merchant Marine & Fisheries, 101st Cong., 1st Sess. (1989) (statement of Michael G. Zozak, Deputy Assistant Secretary for Inter-American Affairs).

[86] Pickering, *supra* note 83, at 2.

[87] O.A.S. CHARTER, *supra* note 81, art. 137.

> No State or group of States has the right to intervene, directly or indirectly, for any reason whatever, in the internal or external affairs of any other States. The foregoing principle prohibits not only armed force but also any other form of interference or attempted threat against the personality of the State or against its political, economic and cultural elements.[88]

Article 20 of the O.A.S. Charter expressly recognizes the territorial inviolability of a State and reaffirms the general prohibition against military intervention: "The territory of a State is inviolable; it may not be the object, even temporarily, of military occupation or of other measures of force taken by another State, directly or indirectly, on any grounds whatever."[89]

The U.S. has imposed a strained construction on the O.A.S. Charter by advocating that the action was not an intervention but rather "an [a]ct of self-defense made inevitable by the cohabitation . which requires the presence of Americans—including American troops in Panama. "[90] Although the U.S. has been accorded the right under article IV of the Panama Canal Treaty to maintain troops in certain designated areas of Panama until the year 2000,[91] the explicit grant to the U.S. to maintain troops in Panama to protect and defend the Canal cannot be construed to be a waiver by Panama of the inviolability of the entire territory of Panama.[92] Nor can the rights granted to the U.S. under article IV be interpreted as a waiver of Panama's sovereign political rights, including freedom from intervention against the personality of the state of Panama or against its political elements as guaranteed under the O.A.S. Charter.[93] No such waiver has been enunciated in the Panama Canal Treaty nor can any such waiver reasonably be implied.[94] The U.S. attack outside the Canal Zone against the existing governmental structure in Panama was thus violative of both articles 18 and 20 of the O.A.S. Charter.

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[88] *Id.* at art. 18.

[89] *Id.* at art. 20.

[90] Dec. 22, 1989 O.A.S. Session, 95 (Doc. No. CP/ACTA 800/89) [hereinafter O.A.S. Session].

[91] *See* Panama Canal Treaty, Sept. 7, 1977, United States-Panama, 33 U.S.T. ____, T.I.A.S. No. 10030.

[92] *See id.* Article 1(2) specifically grants to the U.S. the "rights necessary to manage, operate, maintain, improve, protect and defend the Canal."

[93] Maier, *United States Defense Rights in the Panama Canal Treaties: The Need for Clarification of a Studied Ambiguity*, 24 VA. J. INT'L L. 287, 308-09 (1984).

[94] *Id.*

The U.S. employed strong language in attempting to persuade other O.A.S. members of the merit of its actions. U.S. Ambassador Einuadi stated *inter alia*,

> [W]e acted in Panama for legitimate reasons of self-defense [we acted] in conformity with Article 51 of the U.N. Charter, Article 21 of the Charter of the [O.A.S.], and the provisions of the Panama Canal Treaties.
>
> Above all, I would ask you to remember that the judgment of history will lay upon this organization. By improperly invoking the legitimate principle of nonintervention in this case, the O.A.S. will find itself cast on the side of the dictators and the tyrants of this world who are en route to extinction. It will find itself, in objective terms, defending the indefensible. It will find itself on the side of Noriega.
>
> I am using strong language. In so doing, I am confident that I reflect the long simmering outrage of the people of my own country and I believe, of many in this hemisphere who are sick of stolen elections, sick of military dictatorships, sick of narco-strongmen and sick of the likes of Manuel Noriega. This hemisphere, this organization, cannot afford to fail on these issues.
>
> As I mentioned a moment ago, the United States acted in self-defense and in defense of the Panama Canal Treaties. I need not dwell on the immediate events and provocations that precipitated our action—the gratuitous killing of an unarmed American soldier, the terrorizing of a U.S. military couple, and the general climate of intimidation and instability engineered by Noriega, which by last weekend had become a clear and present danger to our ability to meet our commitments under the Panama Canal Treaty
>
> In a word, when Noriega forced the issue, the United States was forced to a path not of our choosing, but a path dictated by our national rights and responsibilities. In all frankness, is this organization now prepared to forfeit the respect which it has earned in the eyes of the American people and the moral authority which it enjoys throughout this hemisphere by challenging the just verdict that history has decreed upon Manuel Noriega?[95]

The O.A.S. was unpersuaded by these remarks. Noting the U.S. obligation to abstain from intervening, directly or indirectly, for whatever reason, in the internal or external affairs of any other State, and affirming the right of Panamanians to self-determination

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[95] Einaudi, *supra* note 80, at 3.

without outside interference, the O.A.S. overwhelmingly approved a resolution that deeply deplored the U.S. military intervention in Panama. The resolution also called for an immediate end to the fighting.[96]

The sentiments articulated by the Jamaican delegate to the O.A.S. were representative of those of most O.A.S. delegations. The Jamaican representative stated,

> The Government of the United States communicated with the Government of Jamaica in the early hours of Wednesday morning to advise that the invasion was under way and to explain the reasons for the action taken.
>
> We have carefully considered these reasons and have consulted with as many regional governments as we have been able to reach. These discussions have confirmed and supported our view that none of the reasons so far advanced by the United States in support of their action can possibly justify this grave breach of the most fundamental principle of international law We regard it moreover as a retrograde step in the relations between the United States and countries in this hemisphere. It is in conflict with the right of individual nations to self-determination and dramatically at variance with the worldwide trend towards the renunciation of force as a means of settling international disputes.[97]

Displeasure with, and resentment of, the U.S. by Latin American countries did not terminate with the approval of the O.A.S. Resolution. These countries continue to harbor ill feelings about the invasion.[98]

C. Maintaining the Integrity of the Panama Canal Treaties

In addition to the U.N. and O.A.S. Charter defenses, the U.S. tried to justify its actions under the 1977 Panama Canal Treaty However, the U.S. action cannot be justified under the Panama Canal Treaty because no direct threat to the Canal or Canal

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[96] Twenty delegations voted in favor of the resolution, six abstained (El Salvador, Guatemala, Honduras, Venezuela, Antigua, and Costa Rica) and the U.S. cast the only dissenting vote. *See supra* note 72, at 110-11; N.Y. Times, Dec. 23, 1989, § A, at 15, col. 6; Wash. Post, Dec. 23, 1989, § A, at 7, col. 5.

[97] O.A.S. Session, *supra* note 90, at 131-32.

[98] U.S. Vice President Quayle travelled to Latin America in early 1990. The leaders of Mexico, Venezuela, and Peru refused to meet with him so soon after the U.S. invasion. The leaders of Honduras and Jamaica impressed upon him the need to remove the excess U.S. troops from Panama. L.A. Daily Journal, Feb. 12, 1990, at 6, col. 1.

operations existed. Even if the U.S. allegations that threats to the Canal arising from within Panama existed were accurate, unilateral action to protect the Canal against such threats has no basis of support in the text of the 1977 Treaties or their negotiating history. Even if the U.S. did possess an independent right of intervention to protect the Canal against Panamanian threats, such a right would necessarily be limited to ensuring peaceful transit through the Canal. The circumstances of the invasion failed to comply with this requirement.

The U.S. has maintained that article IV of the Panama Canal Treaty gives it both the right and duty to protect and defend the Panama Canal. The U.S. contends that it was entitled under the treaty to take measures to defend U.S. military personnel and U.S. installations and respond to the threat to canal operations:

> [T]he United States has both the right, and for that matter, the duty to protect and defend the Panama Canal under Article 4 of the Panama Canal Treaty The basic U.S. responsibility is to operate and defend the Panama Canal until its transfer to Panama at the end of this century
>
> For the past 2 years the Noriega regime engaged in a systematic campaign to harass and intimidate U.S. and Panamanian employees of the Panama Canal commission and the U.S. forces. [T]his provocative and intolerable behavior reached a peak last Friday It threatened American and Panamanian lives as well as Canal operations.
>
> We resorted to military action where our ability to honor obligations under the Panama Canal Treaty was threatened by violent actions.[99]

Under the Vienna Convention on the Law of Treaties, the ordinary meaning given to the terms of the Treaty text is the single most important element in interpreting treaties.[100]

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[99] Pickering, *supra* note 83, at 2.

[100] Articles of the Vienna Convention provide as follows:

> Article 31. General rule of interpretation.
>
> 1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.
>
> 2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:
>
> (a) any agreement relating to the treaty which was made between all the parties in connexion with the conclusion of the treaty; (b) any instru-

The Panama Canal Treaty recognizes the territorial sovereignty of Panama over the Canal. As territorial sovereign, Panama expressly grants the U.S. the rights necessary to, among other things, protect and defend the Canal. Article I(2) of the Treaty provides as follows:

> In accordance with the terms of this Treaty and related agreements, the Republic of Panama, as territorial sovereign, grants to the United States of America, for the duration of this Treaty, the rights necessary to regulate the transit of ships through the Panama Canal, and to manage, operate, maintain, improve, protect and defend the Canal.[101]

Under article IV(1) of the Treaty, the U.S. retains primary responsibility for protecting and defending the Canal until the year 2000:

> For the duration of this Treaty, the United States of America shall have primary responsibility to protect and defend the Canal. The rights of the United States of America to station, train and move military forces within the Republic of Panama are described in the Agreement in Implementation of this Article, signed this date.[102]

Since the U.S. assumes only primary responsibility for protecting and defending the Canal, it does not have exclusive responsi-

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ment which was made by one or more parties in connexion with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.

3. There shall be taken into account, together with the context:

(a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;

(b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;

(c) any relevant rules of international law applicable in the relations between parties.

4. A special meaning shall be given to a term if it is established that the parties so intended.

Article 32. Supplementary means of interpretation.

Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of Article 31, or to determine the meaning when the interpretation according to Article 31:

(a) leaves the meaning ambiguous or obscure; or

(b) leads to a result which is manifestly absurd or unreasonable.

Vienna Convention on the Law of Treaties, Arts. 31-32 [hereinafter Vienna Convention].

[101] Panama Canal Treaty, *supra* Note 91, at art. I(2).

[102] *Id.* at art. IV(1).

bility, but has joint responsibility with Panama to protect and defend the Canal. Article I(3) states, "The Republic of Panama shall participate increasingly in the management and protection and defense of the Canal, as provided in this Treaty."[103]

Article IV(1) further provides,

> The United States of America and the Republic of Panama commit themselves to protect and defend the Panama Canal. Each Party shall act, in accordance with its constitutional processes, to meet the danger resulting from an armed attack or other actions which threaten the security of the Panama Canal or of ships transiting it.[104]

Under article IV(1) of the Treaty, the U.S. needs to establish foremost that an armed attack or other actions threatened the Canal. The U.S. alleged violations of U.S. military bases and instances of detention and harassment of U.S. and Panamanian employees of the Canal Commission. The relationship between these actions and threats to the Canal is difficult to see unless the U.S. is alleging that the general atmosphere in Panama gave it justifiable concern that the security of the Canal was threatened. Yet, any such concern must be viewed with a measure of skepticism because U.S. Representative Kozak acknowledged just one month prior to the invasion that Noriega sought to avoid any direct threat to the Canal.[105]

Even assuming internal Panamanian threats to the Canal existed, it is highly questionable whether the U.S. had an individual duty of action or even an individual right of action to protect the Canal. The Treaty envisages a regime of collective, not individual, action to ensure the safe, efficient, and uninterrupted operation of the Canal. Article I(4) obligates both parties to cooperate to ensure open access to the Canal: "In view of the special relationship established by this Treaty, the United States of America and the Republic of Panama shall co-operate to assure the uninterrupted and efficient operation of the Panama Canal."[106]

More noteworthy, article IV(3) and (4) set forth the cooperative measures to be undertaken by the armed forces of both countries, including the preparation of contingency plans for the protection and defense of the Canal:

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[103] *Id.* at art. I(3).

[104] *Id.* at art. IV(b).

[105] Panama Canal: The Strategic Dimension, *supra* note 85, at 3.

[106] Panama Canal Treaty, *supra* note 91, at art. I(4).

(3) In order to facilitate the participation and cooperation of the armed forces of both Parties in the protection and defense of the Canal, the United States of America and the Republic of Panama shall establish a Combined Board comprised of an equal number of senior military representatives of each Party These representatives shall be charged by their respective governments with consulting and cooperating on all matters pertaining to the protection and defense of the Canal, and with planning for actions to be taken in concert for that purpose. The Combined Board shall provide for coordination and cooperation concerning such matters as:

(a) The preparation of contingency plans for the protection and defense of the Canal based upon the cooperative efforts of the armed forces of both Parties;

(b) The planning and conduct of combined military exercises; and

(c) The conduct of United States and Panamanian military operations with respect to the protection and defense of the Canal.

(4) The Combined Board shall, at five-year intervals, throughout the duration of this Treaty, review the resources being made available by the two Parties for the protection and defense of the Canal. Also, the Combined Board shall make appropriate recommendations to the two Governments respecting projected requirements, the efficient utilization of available resources of the two Parties, and other matters of mutual interest with respect to the protection and defense of the Canal.[107]

The Panama Canal Treaty fails to address explicitly the situation where the Canal is threatened by internal events within Panama or to define the rights and obligations of the U.S. in such a situation. One commentator suggests that failing to include a provision in the treaties dealing with such a contingency is understandable:

[I]t would be politically unacceptable for Panama explicitly to grant the United States a right to use force against it in the event of a breach of the treaties. Panama, as a sovereign state, could never accept such a provision; and there might be serious political repercussions among our [U.S.] allies if the United States tried to insist on the inclusion of such a provision.[108]

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[107] *Id.* at art. IV(3), (4).

[108] Note, *Legal Issues Involved in the Transfer of the Canal to Panama*, 19 HARVARD INT'L L.J. 279, 295 (1978).

A cogent argument can be developed that the U.S. may act to protect and defend the Canal only if the Republic of Panama agrees to such action. The cooperative regime established under the treaty, whereby protection and defense of the Canal is to be facilitated by a joint U.S.-Panamanian defense force, strengthens the thesis that unilateral U.S. action to defend the canal has no foundation under the Treaty [109] Arguably the U.S. is not entitled to act against any threat to the Canal without Panama's consent, especially where the Canal is threatened by actions from within Panama.

Cast in a light most favorable to the U.S., the circumstances, if any, under which the U.S. may act unilaterally to defend the Panama Canal cannot be definitively ascertained by reference to the text of the Treaty Under the rules set forth in the Vienna Convention, this issue can be resolved by reference to 1) treaties in *pari materia*, 2) any agreements regarding the interpretation of the treaty, 3) relevant rules of international law applicable to both the U.S. and Panama, and 4) the negotiating history and context in which the Treaty was signed.[110]

The Neutrality Treaty is in *pari materia* with the Panama Canal Treaty since both were negotiated concurrently and with respect to the same subject matter [111] The Neutrality Treaty establishes the permanent neutrality of the Canal.[112] Article IV of the Neutrality Treaty requires Panama and the U.S. to maintain the neutrality of the Canal: "The United States of America and the Republic of

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[109] In testimony before the U S. Senate Committee on Foreign Relations, Secretary of State Vance stated that the Treaties "create a partnership under which our two countries can join in the peaceful and efficient operation of the Canal." New Panama Canal Treaties, Hearing Before the Senate Committee on Foreign Relations, 95th Cong., 1st Sess. (1977) (statement of Cyrus Vance, Sec. of State).

[110] *See* Vienna Convention, *supra* note 100.

[111] *See* Maier, *supra* note 93, at 300.

[112] Article I states, "The Republic of Panama declares that the Canal, as an international transit waterway, shall be permanently neutral in accordance with the regime established in this Treaty. " Article II further states,

> The Republic of Panama declares the neutrality of the Canal in order that both in time of peace and in time of war shall remain secure and open to peaceful transit by the vessels of all nations on terms of entire equality, so that there will be no discrimination against any nation, or its citizens or subjects, concerning the conditions or charges of transit, or for any other reason, and so that the Canal, and therefore the Isthmus of Panama shall not be the target of reprisals in any armed conflict between nations of the world.

Panama Canal Permanent Neutrality and Operation Treaty, Sept. 7, 1977, United States-Panama, 33 U.S.T. ____ , T.I.A.S. No. 10029.

Panama agree to maintain the regime of Neutrality established in this Treaty, which shall be maintained in order that the Canal shall remain permanently neutral, notwithstanding the termination of any other treaties entered into by the two Contracting Parties."[113]

During the course of the U.S. Senate debate on ratification of the 1977 Treaties, the U.S. asserted it had a unilateral right to resort to force if necessary to maintain the regime of neutrality [114] Panamanian negotiators vehemently disputed this position and maintained that the Neutrality Treaty provided no right of intervention absent Panamanian consent.[115] The two countries found themselves at an impasse. The position assumed by each party represented equally unwelcome possibilities to the other. As Maier explains,

> The United States and the Republic of Panama were faced with a serious political and legal dilemma growing out of issues related to intervention. The treaties were viewed as vitally important by the governments of both countries; but a right to intervene to protect the Canal was important to United States Senate approval—and an anathema to the Panamanian public.[116]

To overcome the impasse, President Carter and President Torrijos issued an unsigned statement of interpretation that was subsequently incorporated into the Neutrality Treaty as an amendment:

> Under the treaty concerning the permanent neutrality and operation of the Panama Canal [the neutrality treaty], Panama and the United States have the responsibility to assure that the Panama Canal will remain open and secure to ships of all nations. The correct interpretation of this principle is that each of the two countries shall, in accordance with their Constitutional processes, defend the Canal against the threat to the regime of neutrality, and consequently shall have the right to act against any aggression or threat directed against the Canal or against the peaceful transit of vessels through the Canal.
>
> This does not mean, nor shall it be interpreted as the right

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[113] *Id.* at art. IV

[114] *See* Note, *supra* note 87, at 293.

[115] In an August 1977 news conference, Panama's chief negotiator Romula Bethancourt rejected any unilateral rights of U.S. intervention under the Neutrality Treaty: "The Neutrality pact does not provide that the United States will say when neutrality is violated the two countries jointly will determine how they will guard against such a violation The pact does not establish that the U.S. has the right to intervene in Panama." Maier, *supra* note 93, at 300 n.66.

[116] Maier, *The Right to Defend the Panama Canal*, 13 GA. J. INT'L L. 217, 219 (1983).

> of intervention of the United States in the internal affairs of Panama. Any United States action will be directed at insuring that the Canal will remain open, secure and accessible, and it shall never be directed against the territorial integrity or political independence of Panama.[117]

The words "each of the two countries" in the first paragraph seems to signify that the U.S. has a separate right to defend the Canal. The right to act against "any aggression or threat" seems to confer a broad right of unilateral action against any perceived threat, presumably including a threat from within Panama. However, by employing terms from article 2(4) of the U.N. Charter, the second paragraph severely qualifies and limits the interventionary rights of the U.S.[118] As discussed earlier, articles 2(4) and 51 of the U.N. Charter are viewed by most states as containing a general prohibition against the use of force by individual states, except in self-defense where a prior armed attack against the geographical territory of the state has occurred. Since the Panama Canal Treaty explicitly recognizes the sovereignty of Panama over the former Canal Zone and the Canal, there is no conceivable basis upon which the U.S. can unilaterally resort to force in the Canal Zone without compromising the territorial integrity of Panama.[119] Panama certainly did not surrender its rights of territorial sovereignty within the Canal Zone. The U.S. State Department itself has acknowledged that the U.S. never exercised sovereignty over the Canal Zone even before 1977 The U.S. merely exercised treaty rights within Panamanian territory·

> In allowing Panama to assume jurisdiction over the zone, the United States is not giving up sovereignity over territory which belongs to us, like Alaska and the Louisiana territory Legally the zone has always remained Panamanian territory and the United States has never had sovereignty over it, merely treaty rights within it.[120]

On the other hand, an argument can be made that U.S. action within Panamanian territory in order to ensure that the Canal

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[117] The Statement of Understanding issued by the two leaders was intended merely to serve as an interpretation of the text rather than an alteration of it. Maier, *supra* note 93, at 302.

[118] *See id.* at 302-08.

[119] *Id.* at 303-05.

[120] *New Treaties*, *supra* note 10, at 8.

remains open and accessible (even without Panamanian consent) is not violative of the non-intervention language since such action does not seek a change in Panama's territory Additionally, such action would not amount to intermeddling in the political affairs of Panama.[121] During Senate deliberations on the 1977 Treaties, the State Department and the Justice Department advanced such an argument.[122] Although this argument may carry weight as to threats from third parties, it is difficult to discern how responding unilaterally to an internal threat to the Canal would not encroach upon the political independence of Panama by usurping Panama's sovereign political right to respond to internal events within its own territory [123] At a minimum, unilateral U.S. intervention to protect the Canal against threats arising from within Panama has no foundation in the Neutrality Treaty as interpreted by the Carter-Torrijos Statement of Understanding.

During the ratification process, Democratic Senator DeConcini introduced a reservation to the Neutrality Treaty proclaiming a unilateral right of military intervention in the event Canal operations were impeded.[124] The U.S. Senate initially approved the Neutrality Treaty with this unilateral reservation. Panama was incensed by the adoption of the reservation, declaring that it amounted to a violation of the U.N. Charter since the U.S. was effectively

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[121] Maier, *supra* note 93, at 303.

[122] Assistant U.S. Attorney General John Harmon stated the following in a 1977 letter to Senator John Sparkman:

> A legitimate exercise of rights under the Neutrality Treaty by the United States would not either in intent or in fact, be directed against the territorial integrity or political independence of Panama. No question of detaching territory from the sovereignty or jurisdiction of Panama would arise, nor would the political independence of Panama be violated by measures calculated to uphold a commitment to the maintenance of the Canal's neutrality which Panama has freely assumed. A use of force in these circumstances would not be directed against the form or character or composition of the Government of Panama or any other aspect of political independence; it would be solely directed and proportionately crafted to maintain the neutrality of the Canal.

Letter from Assistant Attorney General John Harman to Senator John Sparkman (Nov. 1, 1977) *reprinted in Hearings Before the Senate Comm. on Foreign Relations*, 95th Cong., 1st Sess., pt. 1, at 329, 332 (1977).

[123] Maier, *supra* note 93, at 308-11.

[124] The Reservation stated the following:

> [I]f the canal is closed, or its operations are interfered with, the United States of America and the Republic of Panama shall each independently have the right to take such steps as it deems necessary, in accordance with its constitutional processes, including the use of military force in Panama, to reopen or restore the operations of the canal, as the case may be.

Panama Canal Treaties: Major Carter Victory, 34 CONG. Q. ALMANAC 379, 393 (1978).

insisting that the U.S. had a license to indefinitely undertake military action on Panamanian territory without Panama's consent.[125] To allay Panamanian objections and to obviate the need for an additional Panamanian plebiscite, a compromise reservation was adopted to the Panama Canal Treaty,[126] which reaffirmed U.S. adherence to the principle of non-intervention and strictly limited U.S. action to ensuring that the Canal remain open, secure, and accessible:

> Pursuant to its adherence to the principle of non-intervention, any action taken by the United States of America in the exercise of its rights to assure that the Panama Canal shall remain open, neutral, secure and accessible, shall be only for the purpose of assuring that the Canal shall remain open, neutral, secure and accessible, and shall not have as its purpose or be interpreted as a right of intervention in the internal affairs of the Republic of Panama or interference with its political independence or sovereign territory [127]

Panamanian objections to the initial DeConcini reservation, coupled with the compromise reservation adopted, provide persuasive evidence that both parties intended, at the very least, to exclude any unilateral right of U.S. action to defend the Canal against internal Panamanian threats. Responding to threats from within Panama, without Panamanian consent, would effectively amount to interference in the internal affairs of Panama and would compromise Panama's political independence.

Such action also would be inconsistent with article 18 of the O.A.S. Charter, an international treaty to which both Panama and the U.S. are parties.[128] This provision strictly forbids any form of interference against the personality of the State or against its political elements.[129]

To embrace an interpretation allowing unilateral U.S. action in such circumstances also would be in violation of article 103 of the U.N. Charter, which establishes the primacy of U.N. Charter ob-

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[125] G. MOFFETT, *supra* note 10, at 88-90, 100-101.
[126] *Id.* at 88-90.
[127] Maier, *supra* note 116, at 223.
[128] O.A.S. CHARTER, *supra* note 82, at art. 18.
[129] *Id.*

ligations over inconsistent obligations under other international agreements.[130]

Even if there were internal threats to the Canal, an interpretation allowing the U.S. a unilateral right to act to protect the Canal against such threats has no basis of support in the text of the 1977 Treaties, the negotiating history of both Treaties, or in the relevant rules of international law applicable to both the U.S. and Panama.

Assuming arguendo that the U.S. does possess an independent right of intervention to protect the Canal against threats inside Panama, such a right would not be an open ended one.[131] Rather, the exercise of any such right would need to be strictly limited to ensuring peaceful transit through the Canal. Adopting this interpretation does not in any way purge the taint of illegality from the U.S. action; the U.S. action was not limited to assuring open and secure access to the Canal. A full scale invasion of virtually the entire territory of Panama was launched by the U.S., using massive military force directed against the Panamanian government. Panama certainly did not expressly or implicitly relinquish its political independence or the territorial inviolability of the entire state of Panama.[132] The U.S. action is at least in contravention of previous U.S. interpretations of the 1977 Treaties concerning the permissible parameters of unilateral U.S. action.

Rather than maintaining the integrity of the 1977 Treaties, the U.S. invasion undermined the principal aim of these Treaties of assuring uninterrupted transit through the Canal. As a result of

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[130] Article 103 of the U.N. Charter states, "In the event of a conflict between the obligations of the members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail." U.N. CHARTER, ch. XVI, art. 103, para. 1. Ironically, article 103 of the U.N. Charter and the unanimous U.N. Declaration on Friendly Relations were relied upon by the U.S. State Department in denouncing the illegality of the Soviet invasion of Afghanistan. The Soviets unsuccessfully attempted to defend their actions in the U.N. on the basis of a Treaty of Friendship and Mutual Assistance previously entered into with Afghanistan. Pursuant to the Brezhnev Doctrine, the U.S.S.R. asserted the Treaty gave it the right and the duty to intervene militarily in its neighboring socialist state. E. HOYT, *supra* note 7, at 237 n.1.

[131] Even if it is acknowledged that U.S. military action aimed exclusively at defending the Panama Canal against internal aggression is not violative of the territorial integrity or political independence of Panama, a massive armed invasion that overthrows a governmental regime would definitely violate the political independence of Panama since it is directed against the character and composition of the Government of Panama. *See* Schachter, *supra* note 48, at 1637-38.

[132] Maier, *supra* note 93, at 308-09.

the invasion, the Canal was closed for the first time in its 75 year history [133]

D. Restoring Democracy in Panama

As moral and political justification for the invasion, the U.S. claimed that the action facilitated the restoration of democracy in Panama. Ambassador Einuadi emphasized that the invasion should be warmly embraced by the O.A.S. for achieving this objective:

> Today, we are once again living in historic times, a time when a great principle is spreading across the world like wild fire. That principle, as we all know, is the revolutionary idea that people, not governments, are sovereign. This principle is the essence of the democratic form of government. It is by no means a new idea. But it is an idea which has, in this decade, and especially in this historic year—1989—acquired the force of historical necessity
>
> It was not too long ago that many governments and regimes usurped the sovereign right of their peoples in the name of all-encompassing ideologies. Those pretensions, those mystifications, have now been unmasked for the fraud that they are. Democracy today is synonymous with legitimacy the world over; it is, in short, the universal value of our time. Regimes which are undemocratic may employ violence or terror to subvert the sovereign will of their citizenry for a time; they may invoke, and in so doing pervert, the principle of national sovereignty to forestall the truly sovereign judgment of their own people. But in the eyes of their people, they are illegitimate, and they will fail.
>
> It was not too long ago that it was fashionable in certain quarters to argue that democracy was the privilege of a relatively few nations, and not the birth-right of all humanity Try telling that today to the peoples of Eastern Europe. Try telling that to the people of this hemisphere who, in the early part of this decade, unleashed the great democratic tide which is now sweeping the globe. That tide has now returned to this hemisphere in the last month of this decade, with a free election in Chile and the restoration of democracy in Panama.
>
> In the name of all those throughout the Americas who have

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[133] Michael J. Rhode, Jr., Secretary of the Panama Canal Commission, stated that the Canal was closed as a precautionary measure due to a concern that the proximity of ships in the Canal to land could render them vulnerable to Panamanian aggressions. Washington Post, Dec. 21, 1989, § A, at 31, col. 4.

> struggled, fought and died for freedom ... in the name of the Panamanian citizens who have suffered Noriega's outrages, [the O.A.S.] should do what is right—it should welcome the restoration of democracy in Panama. It is time that this organization welcomed Noriega's departure, just as the world has in the past welcomed the departure of Somoza, Duvalier, Marcos, and, more recently, Honecker, Zhivkov, and Husak. It is time that this organization put itself on the right side of history [134]

The O.A.S. Charter identifies the establishment of democracy as a condition for fulfilling the organization's aims. Article 3 of the Charter states, "The solidarity of the American states and the high aims which are sought through it require the political organization of those States on the basis of the effective exercise of representative democracy."[135]

The existence of representative democracy among O.A.S. member states is a vision and not a binding legal obligation. Article 13 of the O.A.S. Charter proclaims the right of each state to develop its own political life freely [136] Failure to establish democracy does not give rise to a right of unilateral military intervention to facili-

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[134] Einuadi, *supra* note 80, at 3. Einuadi's reliance upon the democratic tide sweeping Eastern Europe totally misses the point and weakens the U.S. position. Once the Soviet Union withdrew military support, Eastern European governments, lacking popular support, quickly faltered. The lesson to be learned from Eastern Europe may be that governments lacking popular consent cannot continue to exist indefinitely. If the U.S. had learned this lesson, it would have realized that the Noriega government, lacking popular legitimacy, would have eventually witnessed its own undoing. Forcing democracy on a country cannot be justified as a lesson learned from Eastern Europe.

[135] O.A.S. CHARTER, *supra* note 81, at art. 3. The Preamble to the O.A.S. Charter also recognizes the existence of democratic institutions as a political ideal: "Confident that the true significance of American solidarity and good neighborliness can only mean the consolidation on this continent, within the framework of democratic institutions, of a system of individual liberty and social justice based on respect for the essential rights of man." *Id.* at Preamble; D. ARMSTRONG, *supra* note 6, at 100.

[136] *See* A. THOMAS, THE ORGANIZATION OF AMERICAN STATES at 212-245 (1963). Thomas sketches the record of the O.A.S. in promoting democracy in the Americas and concludes as follows:

> [T]here has been an apparent unwillingness to adopt binding legal obligations that each nation in this hemisphere shall become a democracy ...
>
> Pan-Americanism has stress[ed] the principle that a state must be free to choose any form of government or political institution it desires, must be free to treat its own citizens as it wishes. Since the first stirrings of the movement, democracy has been stressed as an inter-American goal.
>
> [N]evertheless, no firm legal obligations have been agreed upon to assure the growth of democracy throughout the region.

Id. at 227-39.

tate the creation or restoration of democratic institutions. To the contrary, article 18 of the revised O.A.S. Charter forbids armed intervention for any reason in the internal affairs of any other State. The promotion of democracy in Panama through the sword of unilateral U.S. military action is prohibited under the O.A.S. Charter.

No authority in the United Nations Charter allows the unilateral use of force to install democratic government. One legal scholar has called for a reinterpretation of article 2(4) to legitimize the unilateral use of force against a repressive regime, provided such action enhances the right of the people to self-determination.[137]

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[137] Acknowledging that intervention to establish democracy is not legally justified, one commentator insists nonetheless that human rights law demands intervention against tyranny when those in "monopolistic control of the weapons and instruments of suppression in a country turn those weapons and instruments against their own people. " D'Amato, *The Invasion of Panama Was a Lawful Response to Tyranny*, 84 AM. J. INT'L L. 516, 519 (1990). D'Amato has gone so far as to suggest that there is no violation of the territorial integrity of a State absent an intent to annex part of the territory of the State. Nor is the political independence of a State compromised unless there was an intent to colonize, annex, or incorporate the State into the invading State. Accordingly, D'Amato asserts that the U.S. intervention in Panama was not violative of article 2(4) because Panama was before and after the intervention an "independent nation."

D'Amato's analysis is fatally deficient in several respects. Under D'Amato's definition of political independence, if a state uses massive force to topple a regime, the political independence of a State is not compromised provided there was no intent to colonize or annex the State into the invading state. From this definition, Nanda has accurately deduced that the Soviet invasions of Hungary, Czechoslovakia, and Afghanistan, and the Nazi invasions of several European nations were not directed against the political independence of those states. Nanda, *supra* note 1, at 494, 499 n.29. D'Amato has ascribed the same meaning to territorial integrity and political independence. Certainly, the drafters of article 2(4) would not have included different terms if they had the same meaning. To do so would have been unnecessarily redundant. D'Amato's understanding of those terms is simply misplaced. As Farer has aptly stated, if sovereignty means anything, it means *inter alia* that one state cannot "dictate the character or the occupants of its governing institutions." D'Amato, *supra*, at 520.

D'Amato's assertion that any nation with the will and the resources may intervene to protect the population of another nation against tyranny is especially problematic. Is he not in effect advocating that the U.S. act as a global policeman, protecting citizens against the tyranny of their own leaders? Under D'Amato's formula, the U.S. many presumably determine when the leaders of a country are acting in a tyrannical fashion. This self-judging approach is highly dangerous. D'Amato does not inform us as to what point in the continuum of tyranny the right of unilateral intervention is activated.

Human rights abuses exist in numerous countries throughout the world. Is Professor D'Amato endorsing a unilateral right of U.S. action anywhere in the world where instruments of suppression are being used against citizens and, if so, is he not then essentially sanctioning unilateral U.S. military intervention in close to half the countries in the world? Surely, Professor D'Amato must realize these dangers.

See Nanda, *supra* note 1, at 494, 499 n.29; Farer, *Panama: Beyond the Charter Paradigm*, 84 AM. J. INT'L L. 503, 507 (1990).

Yet, not a scintilla of evidence can be found in the U.N. Charter that supports an interpretation rendering the general prohibition against unilateral use of force subservient to the right of self-determination.[138]

Reisman states that the U.N. established a comprehensive collective security system that never realized its aim of halting unilateral resort to force. In elucidating this claim, Reisman draws an analogy between the U.N. and an ineffective Sheriff in the Wild West:

> Intractable conflicts between contending public order systems with planetary aspirations paralyzed the Security Council. The U.N. Charter's mechanisms often proved ineffective. The situation was reminiscent of the standard American morality play: a town in the 'Wild West' in the 19th century without a sheriff, good people, perforce, carrying their own weapons and protecting their rights as they see fit. A sheriff comes to town, announcing that he brings with him law and order. As he will henceforth enforce the law, individuals no longer need carry weapons and the town need not tolerate individual resort to force to protect personal rights [W]ithin six months it becomes clear that the sheriff is utterly incapable of maintaining order.
>
> This is what happened in the international system [A] pattern was established according to which unilateral violations of Article 2(4) might be condemned but to all intents and purposes validated, with the violator enjoying the benefits of its delict. A curious legal gray area extended between the black letter of the Charter and the bloody reality of world politics. While the general Charter prohibition against unilateral action continued, and appropriate organs of the United Nations frequently condemned such action, nothing was done beyond verbal

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[138] Reisman, *Coercion and Self-Determination: Construing Article 2(4)*, 78 AM. J. INT'L L. 642, 644 (1984). Reisman states that the right of self-determination is one of the primary principles underlying the U.N. Charter. While this is true, there is not the slightest indication in the U.N. Charter that the prohibition on unilateral recourse to force should be subservient to the right of self-determination. As Schachter points out,

> We are left to wonder why [the right of self-determination] is now accorded primacy and treated as a "higher law" to which other aims and principles must be subordinated. One would have expected that a proposition so far-reaching in character would have been presented with an appropriate legal and empirical foundation. As it is, it is almost startling to be told that Article 2(4) is now only a means and that such aims as the maintenance of peace and the prevention of aggression are secondary to the enhancement of popular rule.

Schachter, *supra* note 74, at 647-48.

> condemnation. In many cases, the party subject to the condemnation, and hence in violation of international law, was permitted to continue to benefit from the fruits of its illegal action.[139]

As an alternative to routine condemnation of unilateral use of force resulting from the mechanical application of article 2(4), Reisman suggests that distinctions be formulated to establish the legitimacy of certain actions that seek to foster the right of peoples to determine their own political destinies:

> The basic policy of contemporary international law has been to maintain the political independence of territorial communities so that they can continue to express their desire for political community in a form appropriate to them.
>
> Each application of Article 2(4) must enhance opportunities for ongoing self-determination. Though all interventions are lamentable, the fact is that some may serve, in terms of aggregate consequences, to increase the probability of the free choice of peoples about their government and political structure.
>
> The expression of Article 2(4), in the form of a rule, is premised on a political context and a technological environment that have been changing inexorably since the end of the 19th century The rule assumes that the only threat of usurpation of the right of political independence of a people within a particular territorial community is from external, overt invasion.
>
> Coercion should not be glorified, but it is naive and indeed subversive of public order to insist that it never be used, for coercion is a ubiquitous feature of all social life and a characteristic and indispensable component of law The critical question is whether it was applied in support of or against community order and basic policies.
>
> In the construction of Article 2(4), attention must always be given to the spirit of the Charter and not simply to the letter of a particular provision.[140]

Though the removal of despotic regimes may promote values considered desirable,[141] the risks associated with recognizing such a right outweigh any benefits gained. A "reinterpretation" of article 2(4) to legitimize the removal of despotic regimes would unleash violence on both the letter and spirit of the U.N. Charter

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[139] Reisman, *supra* note 138, at 643.

[140] *Id.* at 643-45.

[141] *See* Schachter, *supra* note 63, at 143.

and tend to destroy, rather than enhance, order in the international community [142]

As previously outlined,[143] some states and commentators advocate a right of humanitarian intervention to rescue nationals abroad. According to this view, such action does not violate the territorial integrity and political independence of a state provided it is aimed exclusively at, and carefully circumscribed to, rescuing nationals. Certainly, even those asserting a broad right of humanitarian intervention would not credibly maintain that the use of force to overthrow a repressive regime does not contravene the political independence of the state and consequently article 2(4).[144] As Schachter convincingly reasons,

> [E]ven if a case can be made that independently of Article 51 a limited rescue mission does not fall within the prohibition of Article 2(4), it is difficult to extend that argument to justify an armed invasion to topple a repressive regime. [F]or a foreign power to overthrow the government of an independent state is surely "against the political independence of that state," whatever its internal political structure. The idea that wars waged in a good cause such as democracy and human rights would not involve a violation of territorial integrity or political independence demands an Orwellian construction to those terms.[145]

The 1970 *Declaration on Principles of International Law Concerning Friendly Relations and Cooperation Among States in Accordance with the Charter of the United Nations* is entirely consistent with Schachter's thesis. The unanimous 1970 Declaration proclaims that,

> No State . has the right to intervene, for any reason whatever, in the internal or external affairs of any other State. Consequently, armed intervention and all other forms of interference or attempted threats against the personality of the State or against its political, economic and cultural elements, are in violation of international law [146]

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[142] *See* Schachter, *supra* note 74, at 646-47.

[143] *See supra* notes 44-76 and accompanying text.

[144] *But see* D'Amato, *supra* note 137, at 519-20.

[145] Schachter, *supra* note 74, at 649.

[146] G.A.Res. 2625, 25 U.N. GAOR Supp. (No. 28) at 123, U.N. Doc. A/8028 (1970). Although this resolution is nonbinding, it does provide persuasive evidence of the international community's interpretation of the provisions of the U.N. Charter.

While insisting that its invasion be applauded, the U.S. admits that it does not have a legal right to intervene to restore democracy:

> I am not here this morning to claim a right on behalf of the United States to enforce the will of history by intervening in favor of democracy where we are not welcomed. We are champions of democracy, but not the gendarme of democracy—not in this hemisphere or anywhere else.[147]

Irrespective of U.S. statements disclaiming a legal right to intervene forcibly to bring about democratic rule, the U.S., by citing the restoration of democracy as a justification for the action, has essentially endorsed the use of force in such circumstances. This endorsement constitutes an effective resurrection of the Johnson Doctrine. Under the Johnson Doctrine, the U.S. proclaimed a right of military intervention to save democracy After the Dominican Republic invasion, the Doctrine was discredited by most Latin American countries as inconsistent with the principle of self-determination and devoid of any basis of legal support in the Inter-American system.[148] The original proclamation of a right to intervene to save democracy was at least more understandable when considered in the context of the Cold War and the East-West ideological confrontation. The Soviet Union has recently shed its excess ideological baggage, recognizing that ideological dogmatism has done more to promote confrontation than to achieve the fundamental objective of the U.N. in maintaining peace and security [149] Allowing Eastern European countries to pursue their own destinies free from outside intermeddling amounts to a renunciation of the Brezhnev Doctrine under which the Soviets sought to maintain a

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[147] Einaudi, *supra* note 80, at 3.

[148] *See* Lillich, *supra* note 53, at 341-51.

[149] Gorbachev has completely eliminated the notion of "class struggle" in international relations and has emphatically rejected the inevitability of conflict between the U.S. and U.S.S.R. According to the Soviets, the rejection of the traditional polarization has been necessitated principally by the emergence of universal human values and the survival of mankind:

> The supremacy of universal human values and observance of universal rules of the world community are the imperatives of our time. The objective requirements of the age we live in, its trends, character and circumstances leave mankind no other choice but to reject the traditional polarization. This is the axiom which underlies both the concept and the practical policies of the new thinking. Of course, it cannot resolve the existing contradictions overnight, but as a start it can alleviate them.

Excerpts from September 26, 1989 Speech by Shevardnadze to U.N., *reprinted in Foreign Policy and Perestroika* 5-14 (1989).

sphere of influence in Eastern Europe by proclaiming a right and duty to intervene to save embattled Socialist countries.[150]

The revival of the Johnson Doctrine by the Bush Administration opens up a Pandora's box. It provides an additional avenue of cover for unlawful armed intervention. The Panama invasion itself offers prime proof of this assertion. It is hard to believe that the U.S. action was designed to restore democracy in Panama when Panama has not historically been subject to democratic rule. For virtually twenty years prior to the U.S. invasion, Panama was ruled by a series of military dictators, most of whom enjoyed U.S. support, including Noriega, who was a paid C.I.A. informant almost until the end of his tenure in power.[151]

Legitimizing intervention to establish democratic rule also dramatically erodes the legal boundaries on recourse to force. As Schachter accurately observes,

> It introduce[s] a new normative basis for recourse to war that would give powerful states an almost unlimited right to overthrow governments alleged to be unresponsive to the popular will That invasions may at times serve democratic values must be weighed against the dangerous consequences of legitimizing armed attacks against peaceful governments.[152]

E. Apprehending Noriega for Trial in the United States on Drug Trafficking Charges

In 1988, General Noriega was indicted by two U.S. federal grand juries in Florida on charges of laundering money and accepting bribes from Colombia's Medellin drug cartel and other drug traffickers.[153] In his December 20, 1989 statement to the U.N. Security Council, U.S. Ambassador Pickering justified the U.S.

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[150] *See* Butler, *infra* note 197; *see infra* note 200.

[151] *See* Church, *supra* note 26.

[152] Schachter, *supra* note 74, at 649 (footnote omitted).

[153] Noriega was indicted by a federal grand jury in Miami on racketeering charges. The indictment alleges in part that Noriega participated in a conspiracy between 1981 and 1983, during which time he accepted more than $4.6 million in bribes in exchange for offering Panama as a refining and transshipment point for cocaine and as a haven for drug lords from the notorious Colombian Medellin cartel, which reportedly handles the bulk of cocaine smuggled into the U.S. Noriega also allegedly permitted illegal profits from U.S. drug sales to be laundered through Panamanian banks. A federal grand jury in Tampa handed down a separate indictment against Noriega, which charges him with accepting a bribe from a drug trafficker who was smuggling in excess of 1.4 million pounds of marijuana into the U.S. *See* Lacayo, *supra* note 25, at 25.

capture of Noriega on the basis of a novel theory that is without legal precedent in modern history.

> There is another issue at stake in this debate over Panama—the disgrace, the terrible evil of drug trafficking. We have been reminded again of the terrible price brave men and women—and whole societies—pay because these monsters—these drug traffickers—continue in our midst.
>
> This is a war as deadly and as dangerous as any fought with armies massed across borders; the survival of democratic nations is at stake.
>
> Countries that provide safe haven and support for the international drug trafficking cartels menace the peace and security just as surely as if they were using their own conventional military forces to attack our societies. The truth is, and everyone of us knows it, General Noriega turned Panama into a haven for drug traffickers and a centre for money laundering and transshipment of cocaine. General Noriega could not be permitted falsely to wrap himself in the flag of Panamanian sovereignty while the drug cartels with which he is allied intervene throughout this hemisphere. That is aggression. It is aggression against us all, and now it is being brought to an end.[154]

It is unclear from these remarks whether the U.S. considers the activities of drug cartels and the provision of sanctuary for them by a foreign head of state as tantamount to aggression against the U.S. The 1974 General Assembly Resolution defining aggression offers no support for this position. The *Definition of Aggression* establishes that the U.S. invasion of Panama rather than the activities of Noriega amounts to an illegal act of aggression. The *Definition of Aggression* states that "[a]ggression is the use of armed force by a State against another State, or in any other manner inconsistent with the Charter of the United Nations, as set out in

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[154] U.S. Ambassador Einuadi suggested to the O.A.S. that Noriega's aggression against the U.S. preceded the formal declaration of war by the Noriega controlled National Assembly of Representatives five days before the invasion:

> There has been a good deal of mention about the fact that General Noriega declared war on the United States a few days ago. But the truth of the matter is that he declared war on my country a long time ago, from the moment he concluded his first deal with the narcovermin who are wreaking havoc on our city streets and who seek to destroy our nations most precious resource, its youth. Noriega and his ilk, whoever they are and wherever they may be, are guilty of nothing less than premeditated aggression against my country.

Einuadi, *supra* note 80.

this Definition."[155] Six of the seven specific acts of aggression listed in article 3 of the Definition deal with actions involving the use of armed force.[156] Although the acts listed in article 3 are not exhaustive, only the Security Council is empowered to specify other acts that amount to aggression under the provisions of the Charter.[157] The Security Council has not made any determination that the provision of safe haven for drug traffickers by a foreign head of state is a culpable act of aggression under general international law. Pickering's statement seems to advocate an extension of the doctrine of humanitarian intervention permitting the use of armed force against other states to protect U.S. nationals within its own borders from the activities of drug traffickers taking refuge in other countries. Such an extension of the doctrine of humanitarian intervention would greatly expand the legal limits on recourse to force and would create another huge loophole to justify illegal armed intervention. States would have an incentive to rely upon the activities of drug cartels as a pretext for intervention on other grounds, just as they have used the protection of nationals abroad as a pretext for the illegal use of armed force.

No international legal authority exists that permits unilateral use of force within the geographical territory of another state to apprehend a person indicted on drug trafficking charges in a foreign country. Remarkably, the U.S. has refused to publicly disclose the legal grounds upon which it has relied in reaching the conclusion that apprehension of indicted drug traffickers abroad is permissible under international law [158] This refusal may be due to recognition that the legal justifications concocted by the Justice Department would fail to withstand the critical gaze of the international legal community

Lacking any credible legal justification for apprehending Noriega, the U.S. action sets an ominous precedent that is contrary to the U.S. national interest. The logical extension of the U.S.

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[155] *Definition of Aggression*, G.A. Res. 3314, 1 U.N. GAOR Supp. (No. 31) at 143, U.N. Doc. A/9631 (1974).

[156] *Id.*

[157] *Id.* at art. 4; Fairley, *supra* note 51, at 39-40.

[158] The Office of Legal Counsel of the U.S. Justice Department has allegedly prepared three classified legal opinions that try to establish the legality of seizing Noriega for trial in the U.S. On the basis of information leaked to the press and in congressional testimony, one commentator has surmized that the legal opinions of the Justice Department rely upon extremely restrictive interpretations of U.S. federal law and lack any basis of support under international law. *See* L.A. Times, *supra* note 72.

action is the assertion of a right by states to use military force against other states to seize indicted criminals for trial.[159]

The U.S. action is also of questionable value in alleviating the U.S. drug problem. The capture of Noriega will only have a minimal impact in stemming the influx of drugs into the U.S. because the demand for drugs has not diminished, and the major source of most of the cocaine exported to the U.S. is Colombia, not Panama.

The expressed intent of the Bush Administration to address the drug problem to ensure the survival of democratic nations is a worthy goal. Yet, the solution to this problem lies not in unilaterally compromising the sovereign status of other states, an approach which can serve only to threaten the stability of the world order.

F. Military Action Supported by the Democratically Elected Leaders of Panama

As a final justification for the invasion, the U.S. alleged that it had consulted with the democratically elected government of Panama, who welcomed the invasion:

> The freely elected leaders of Panama, President Guillermo Endara and Vice Presidents Calderon and Ford, have assumed the rightful leadership of their country
>
> It is worth noting that the U.S. Government consulted with the democratically elected leadership prior to last evening's actions, and that they approve of our steps.[160]

There is well established precedent in international law legitimizing military intervention prompted by an express invitation from the lawful government of a state.[161] This principle of international law is founded on the notion of consent:

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[159] The U.S. has insisted that Noriega was not seized but rather surrendered voluntarily. The U.S. also has maintained that Noriega was not arrested until he was on board U.S. military aircraft. While this is the official U.S. position, privately many U.S. officials do not dispute that Noriega was coerced into surrendering to American military authorities. It is also highly arguable that Noriega was arrested when he was taken into custody and deprived of his liberty prior to boarding the aircraft. *See* Lewis, *Noriega's Capture Called Unprecedented by Experts*, L.A. Daily Journal, Jan. 15, 1990, at 5, § 1, col. 1.

[160] Einaudi, *supra* note 80.

[161] *See* Joyner, *The United States Action in Grenada: Reflections on the Lawfulness of Invasion*, 78 AM. J. INT'L L 131, 138 (1984).

> If a state consents to an interference within its protected sphere of interests prior to or simultaneously with the act of interference, the act can be said to be legitimate by principles of traditional international law The consenting state exercises its sovereign right in so doing, and the consent on the other hand grants the right to the intervening state. In reality this type of interference cannot be called an intervention, inasmuch as intervention signifies an act or threat of compulsion or coercion of the will of a state by another, an imposition of the will of the intervenor. If consent is given freely, there is no imposition of will.[162]

Although intervening in support of the legitimate incumbent government is permissible, no provision allows a state to intervene on behalf of opposition groups not in control of the state's territory [163] Quincy Wright explains,

> The state is an abstract entity and cannot speak except through its government. Governments come and go, sometimes by constitutional process, sometimes by revolution. It is presumed that a government in firm possession of the territory of a state, even if not generally recognized, can speak for the state. There is a presumption, on the other hand, that a government, even if generally recognized, cannot speak for the state if it is not in firm possession of the state's territory In international law the *de facto* situation is presumed to overrule the *de jure* situation—*ex fact is jus oritur* [164]

Applying these general principles to the facts of the U.S. military action in Panama, U.S. reliance upon the consent of the democratically elected government of Panama is legally suspect. Although most foreign observers agree that Guillermo Endara won the presidential election in Panama, Endara never assumed power because Noriega declared the election null and void.[165] The Endara Government was never in firm possession of the territory of Panama prior to the invasion. Additionally, no states recognized the Endara government as the legitimate government of Panama prior

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[162] A. THOMAS, *supra* note 6, at 91 (footnotes omitted).

[163] Schwenninger, *The 1980's: New Doctrines of Intervention or New Norms of Nonintervention*, 33 RUTGERS L. REV. 423, 428 (1981); *see* Smolowe, *supra* note 35, at 30.

[164] Wright, *Editorial Comment: United States Intervention in the Lebanon*, 53 AM. J. INT'L L. 112, 120 (1959).

[165] Smolowe, *supra* note 35, at 30-31.

to the invasion.[166] Endara had no authority to consent to the invasion. Even if one accepts for purposes of analysis that Endara was the lawful head of the government of Panama, no invitation was initiated by him. The Bush administration merely consulted with the Endara government, which approved the action. This implies that consent was secured only after the decision to invade had been made and raises a suspicion as to whether the consent was given voluntarily without outside inducement.[167]

This justification depends on facts that just do not exist.

IV THE ROLE OF THE LAW AND LESSONS TO BE LEARNED

From early 1988, the U.S. made no attempt to disguise its objective of forcing Noriega's removal from office. This goal seems to have been chosen without regard to the law. It is a violation of both the U.N. and O.A.S. Charters for any country to insist on the composition of political leadership in another country By framing the U.S. goal in this manner, nothing short of Noriega's actual removal from power would have fulfilled the U.S. objective.

Although the law did not shape U.S. objectives, legal considerations initially seem to have played a role in the process by which the U.S. attempted to secure Noriega's surrender of power. The U.S. allowed the Grand Jury deliberations over Noriega's drug trafficking activities to run their course. After drug indictments were issued, the U.S. negotiated privately with Noriega and through the representatives of Latin American countries, and encouraged

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[166] After the Panamanian invasion, the Security Council deadlocked over the issue of whether the Endara government or the Noriega government was the legitimate government of Panama. The Soviet Union, Cuba, and the Security Council's seven nonaligned members from the developing world refused to recognize the Endara government because it was brought to power by the unlawful use of force. While refusing to render a firm opinion on which regime was legitimate, Chief U.N. Legal Counsel Carl-August Fleischauer implied that many lawyers viewed Noriega's designated deputy head as having a strong claim for legitimately addressing the Security Council debate on behalf of Panama. *See* N.Y. Times, Dec. 23, 1989, § A, at 15, col. 1.

[167] As in other instances, the factual uncertainties surrounding the Bush Administration's consultations with Endara make it difficult to assess if consent was voluntarily given without outside pressure. *See, e.g.*, Faincett, *Intervention in International Law, A Study of Some Recent Cases*, 103 Recueil des Cours 347, 361-63 (1961):

> The principle of consent presents difficulties of fact; for it is often hard to determine whether intervening forces have come at the invitation or with the consent of the lawful government, and whether consent has been freely given and is not rather the product of hidden influence or pressure by the intervening power, which will be often found at work in countries on the power frontier.

Noriega to step down by offering him asylum in another country. The U.S. also instituted economic sanctions against Panama and encouraged other states to do the same for the purpose of facilitating Noriega's departure from power. Since no international consensus exists regarding the legality of using economic sanctions to bring about political change in a country, an argument could be made that such a move was not unlawful at least under the U.N. Charter. As Damrosch points out, the reaction to the U.S. sanctions against Panama suggests a "considerable ambivalence in the international community about the use of economic sanctions to affect domestic political trends."[168] Although economic sanctions arguably may not have violated the U.N. Charter, it would be difficult to make a strong claim that sanctions were not in contravention of the non-intervention principle codified in the O.A.S. Charter. This may explain why Latin American countries objected most strenuously to the economic sanctions. Although twenty-two Latin American states denounced the U.S. move as an intervention in the internal affairs of Panama, other states did go along with the U.S. action "by declining to do business as usual with the Noriega regime."[169]

The U.S. also sought to bring about Noriega's removal by strongly encouraging Panama to hold free and fair elections. Although insisting on the establishment of democracy would violate article 13 of the O.A.S. Charter, a strong legal argument could be made that simple encouragement to hold free and fair elections is consistent with article 3 of the O.A.S. Charter, which identifies the existence of representative democracy as a condition for fulfilling the aims of the O.A.S. By encouraging free and fair elections, the U.S. was pursuing its objective of securing Noriega's removal legally This was a shrewd legal technique given Noriega's rapidly eroding popular support. It was a legal ploy that would secure the U.S. objective, provided Noriega was willing to accept the outcome. Noriega's subsequent annulment of the election prevented the U.S. from realizing its goal. Once Noriega refused to comply with the outcome of the election result, the U.S. was able to earn the support of the O.A.S., which condemned Noriega's actions and his abuses of the electoral process. The O.A.S. was even willing to label Noriega's conduct a threat to peace and

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[168] Damrosch, *Politics Across Borders: Nonintervention and Nonforcible Influence Over Domestic Affairs*, 83 AM. J. INT'L L. 1, 33 (1989).

[169] *Id.* at 34.

stability in the region. By employing legal means to achieve its objective, the U.S. was able to gain significant support for its call that Noriega abide by the election results and relinquish his power. The O.A.S. censure provided a measure of legitimacy to U.S. objectives.

Unfortunately, the censure from the O.A.S. was insufficient to achieve the aim that the U.S. had set for itself. After negotiation, mediation, economic sanctions, democratic elections, and censure by the O.A.S. failed to achieve the desired result, the U.S. apparently decided that the unilateral use of force in violation of international law was necessary to fulfill its objective.

The law did not affect the shaping of U.S. objectives in Panama and only influenced the process by which the U.S. sought to achieve its objectives until the U.S. determined that such achievement necessitated the abandonment of legal techniques. The law did influence the manner in which the U.S. sought to legitimize its action. Yet, even in this regard, the law affected the articulation of U.S. justifications less than in previous instances of U.S. involvement in military action in the Americas. Only three of the U.S. justifications were constructed around commonly accepted or even recognized principles of law These included the U.S. defense that its action was necessary to protect its nationals in Panama pursuant to the doctrine of humanitarian intervention. The U.S. also attempted to justify its action under existing treaty obligations and under the doctrine of intervention by invitation.

The international community has acclimated to efforts by states to justify forcible military intervention on the basis of existing treaty obligations or under the doctrine of humanitarian intervention. The international community also has grown accustomed to attempts to justify armed intervention pursuant to the well recognized principle in international law of intervention by invitation. None of these three justifications were able to withstand legal evaluation even under a generous reading of the facts. As a means of protecting American nationals in Panama, the American action did not comply with Sir Humphrey Waldock's permissible parameters within which the customary international law right of self-defense may be legitimately exercised. The U.S. action can not be justified as a self-defense measure under the O.A.S. Charter and was in breach of key provisions of this treaty, such as articles 18 and 20 of the revised O.A.S. Charter, which recognize the territorial inviolability of a State and contain a blanket prohibition on intervention including the use of armed force.

The U.S. claim of a right of military action under the Panama Canal Treaty to protect the Canal was unsupported by the facts, which suggested no direct threat to the Canal existed. Even if threats did exist, it is highly questionable whether the U.S. had the authority to act unilaterally without Panamanian consent against internal Panamanian threats to the Canal. The U.S. invasion did not even conform to previous U.S. interpretations concerning the boundaries within which any unilateral U.S. action to protect the Canal must be taken.

The poorly developed legal arguments advanced by the U.S. in connection with these three recognized legal principles suggest that the U.S., if unwilling to publicly concede the illegality of the action, was at least well aware that its action was not justified from a legal standpoint. During the course of their training, law students are frequently advised to argue the facts in a case if the law is not in favor of their client.[170] The weak legal case for the U.S. action in Panama may explain why the U.S. chose to emphasize so strongly the mitigating circumstances preceding the invasion such as the drug trafficking activities of Noriega, the abuses of human rights under his regime, and the obstruction of democratic processes in Panama as well as the political ends achieved as a result of the action.

What distinguishes U.S. efforts to legitimize the invasion of Panama from other recent military adventures, such as Grenada, is reliance upon a newly devised theory without precedent in modern history The U.S. insisted its apprehension of Noriega was permissible. Pickering's vaguely worded statement in the Security Council that Noriega's activities amounted to aggression against the U.S. is insufficiently developed to constitute a credible legal argument and seems to be more of a factual argument. The refusal of the United States to outline the legal basis for apprehending Noriega suggests not only that the U.S. realized it possessed no such right but more importantly that, because of the ominous precedent such a move would entail, the U.S. does not propose a change in the law to recognize such a right.[171] The U.S. approach of failing to explicitly acknowledge that its defense concerning

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[170] R. FISHER, POINTS OF CHOICE 70 (1978).

[171] During the Cuban missile crisis, the U.S. did not argue that the naval quarantine of Cuba was a legally exercisable right under the self-defense provisions of Article 51 because a broader interpretation of the phrase "if an armed attack occurs" would set a dangerous precedent for the future. *Id.* at 13.

Noriega's apprehension is in mitigation of illegality is dangerous. Members of the international community may be led to believe the U.S. is proposing a change in the law and act accordingly

Another distinguishing feature of U.S. efforts to legitimize the invasion of Panama is reliance on a justification that was previously discredited by Latin American leaders after the U.S. military intervention in the Dominican Republic and that the U.S. admits has no conceivable basis in law The U.S. conceded it did not claim a legal right to invade Panama to restore democracy. Nonetheless, the U.S. strongly implied that the invasion must be viewed in the overall context of the political purpose achieved—namely the restoration of democracy in Panama.

U.S. focus on drug trafficking activities and interference with democratic processes in Panama as well as on the restoration of democracy as a consequence of the U.S. action represents more than just an attempt to deflect attention away from its unlawful assertion of power. These circumstances have been offered as mitigating factors designed to prevent or at least weaken censure from the international community.[172] The U.S. thus hoped that its action could be justified by mitigating factors even though it was unlawful.

Precedent exists in the international community for judging less harshly or refusing to censure the unlawful use of force where there are compelling mitigating circumstances. During the Security Council debates on the Israeli raid on Entebbe, several states flatly refused to temper their judgment of any unlawful action regardless of the circumstances precipitating the action.[173] Other states were willing to consider the mitigating circumstances giving rise to the action and the purpose of the action in deciding, if not the legality of the action, then at least the extent, if any, to which the action should be censured. For example, Sweden took the position that the Israeli raid on Entebbe was a violation of the U.N. Charter but refused to condemn the action given the extenuating circumstances. As the Swedish Representative to the U.N. Security Council explained,

> [Article 2(4)] seeks to protect a right which all peoples find basic: the right to live in peace in their own land.

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[172] This bears some resemblance to criminal law, in which sentencing of a guilty individual by the court may take into account the context and purpose of the unlawful act.

[173] *See supra* notes 56, 59-60 and accompanying text.

> The Charter does not authorize any exception to this rule except for the right of self-defence and enforcement measures undertaken by the Council under Chapter VII of the Charter. This is no coincidence or oversight. Any formal exceptions permitting the use of force or of military intervention in order to achieve certain aims, however laudable, would be bound to be abused, especially by the big and strong, and to pose a threat, especially to the small and weak.
>
> In our view, the Israeli action which we are now considering involved an infringement of the national sovereignty and territorial integrity of Uganda. We understand the strong reactions against this action, which cost the lives of many Ugandan citizens and led to heavy material damage. At the same time, we are aware of the terrible pressures to which the Israeli Government and people were subjected, faced with this unprecedented act of international piracy and viewing the increasing threat to the lives of so many of their compatriots.
>
> The problem with which we are faced is thus many-faceted. My Government, while unable to reconcile the Israeli action with the strict rules of the Charter, does not find it possible to join in a condemnation in this case.[174]

To fully assess the success of U.S. efforts to escape censure from the international community is difficult because alliance patterns can affect voting on U.N. resolutions and frequently produce fudged political statements of compromise in explanation of votes against or abstentions on U.N. resolutions condemning unlawful armed action. Forty states abstained and twenty voted against the General Assembly resolution strongly condemning the U.S. action. The explanations of some states that voted against the General Assembly resolution suggest that the circumstances in Panama

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[174] U.N. Doc. S/PV 1939, *supra* note 60, at 14. Other states, such as the U.S. and Israel asserted that a legal right existed to protect one's endangered nationals in the territory of another State when the latter proved unable to ensure such protection. While not explicitly stating that such a right existed, the French Representative to the U.N. Security Council stated that the circumstances leading to the Entebbe raid could affect the judgment of the action:

> [T]here would not seem to be any doubt that the surprise attack by an armed force on a foreign airport for the purpose of achieving an objective by violence indeed constituted a violation of international law. However, in order to make an objective judgement, we should take into account the circumstances that led up to this action. Obviously, the incident would not have taken place if there had not been beforehand an unlawful threat to the lives and security of innocent persons.

31 U.N. SCOR (1943rd mtg.) at 7, U.N. Doc. S/PV 1943 (1976).

preceding the invasion affected their refusal to support U.N. condemnations of the action. Italy, Turkey, New Zealand, Singapore, and France neither asserted nor denied that the U.S. action violated international law. They simply expressed their opposition to armed intervention and internal interference in States, implying that the U.S. action was an example of both. At the same time, all of these countries refused to support the General Assembly resolution because it was too unbalanced since it did not reflect the drug-trafficking activities in Panama and the lack of respect for democratic procedures under Noriega.[175] This suggests that the U.S. effort to mute the reaction of the international community was effective as to at least a few states.

The U.S. attempt to limit harsh censure from the international community was less successful than it might otherwise have been for several reasons. First, the mitigating circumstances preceding the invasion were not very compelling. In the Entebbe case, international terrorists had hijacked a plane and held several hundred innocent hostages. These facts provided more compelling grounds for launching military action. Not only were U.S. nationals not in imminent danger in Panama, but the drug trafficking activities and obstruction of democratic processes in Panama posed no imminent threat to U.S. nationals. Secondly, as in a criminal court considering sentencing, the context in which the action was committed must be considered along with the factors that motivated the action and the purpose of the action. In the Entebbe case, the Israeli raid was a direct product of an unlawful threat to the lives of innocent persons. In the case of Panama, the drug trafficking activities of Noriega were certainly deplorable. Although the byproduct of the U.S. action may have been to halt tyranny in Panama, the undisguised goal of the U.S. from the outset of the two year standoff with Noriega never changed—securing his removal. From the facts currently available, the U.S. invasion clearly was intended and undertaken to change the existing governmental leadership in Panama. This motive may not have presented a problem for the U.S. in persuading other countries to accept its action or at least not to condemn it if other purposes existed for which a persuasive legal argument could be presented. In this case no such claim could be made. Moreover, reliance upon the restoration of democracy in Panama as justification for the action may have been viewed

[175] *See* U.N. Doc. 7976, *supra* note 73.

skeptically by members of the international community because the U.S. has in the past tolerated a number of dictatorships in Panama, including Noriega himself, who enjoyed strong U.S. support until his sentiments turned anti-American. The focus on Noriega's drug trafficking activities may not have been very influential in persuading countries to temper their judgment of the U.S. action since the available evidence indicates that the U.S. was aware of Noriega's activities for years and remained conspicuously silent.

Viewed from an historical perspective, the law has played a lesser role in U.S. actions in Panama than in the Cuban, Dominican Republic, and Grenadan cases. The law most obviously affected the shaping of U.S. goals and acted as a constraint on those goals during the Cuban missile crisis.[176] While it is less clear to what extent, if any, the law affected the framing of U.S. objectives in the Dominican Republic and Grenadan cases, the selection of U.S. objectives in Panama was clearly made without regard to the law

In all four instances, the law did play a role in the means employed by the U.S. to secure its objectives. In the Cuban missile crisis, the U.S. bestowed an air of legality to its military action by characterizing it as a defensive measure commissioned by the O.A.S. The U.S. employed this legal technique in the Dominican Republic with some success by undertaking the action in conjunction with O.A.S. members and labelling it as an O.A.S. peacekeeping move.[177]

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[176] During the 1962 Cuban missile crisis, the U.S. wanted to thwart Soviet influence in Cuba and to force the removal of Castro. Yet, U.S. policymakers recognized that the U.S. could not lawfully insist that Cuba cut its ties with the Soviet Union or that Castro abdicate his position of power. For this reason, the U.S. articulated narrower objectives for which strong legal arguments could be presented and pursued these objectives through legal techniques. This was accomplished in part by imposing a defensive naval quarantine of Cuba under the auspices of the O.A.S. for the purpose of facilitating the removal of Soviet missiles from Cuba. The law thus had a restraining influence on the shaping of U.S. goals. A. CHAYES, THE CUBAN MISSILE CRISIS 30-40 (1974).

[177] In 1965, the U.S. intervened militarily in the Dominican Republic. A coup d'etat had removed the President of the Dominican Republic, a right wing military dictator, and replaced him with a civilian junta. Military forces sympathetic to the ousted President attempted to overthrow the rebel leader. A military draw ensued and law and order could no longer be maintained. Many viewed the U.S. military action in the Dominican Republic as one aimed chiefly at influencing the course of the rebellion to squelch the potential threat of communism resulting from the victory of a communist-led revolutionary movement. The U.S. advanced several justifications for the action, including two for which a strong legal claim could be made. The U.S. stated that the action was necessary to protect its nationals and the nationals of other countries in the Dominican Republic. The U.S. also described the action as an O.A.S. peacekeeping move. By employing legal procedures available to it through the O.A.S., the U.S. was able to strengthen support for its action. A slim majority of O.A.S. members supported the military action as a peacekeeping move. *See* Lillich, *supra* note 53, at 341-44.

The U.S. described its military action in Grenada as a measure commissioned by the Organization of Eastern Caribbean States [hereinafter O.E.C.S.]. This legal tactic failed to enhance support for the action in part because the O.E.C.S. was long considered a moribund regional collective security alliance.[178] The U.S. employed legal techniques to achieve its objective in Panama, the most effective of which was the encouragement of democratic elections. After Noriega agreed to hold the elections and then refused to comply with the results, the O.A.S. strongly condemned Noriega's abuses of the electoral process and requested him to abide by the election results. This was as far as the O.A.S. was willing to go in supporting the U.S. objective of securing Noriega's departure from power. Unlike the military actions in Cuba and the Dominican Republic, the U.S. was unable to provide a measure of legitimacy to its action in Panama by undertaking it in concert with the O.A.S.[179] Thus, whereas the law continuously affected the process by which the U.S. tried to achieve its objectives in the Cuban, Dominican Republic, and Grenadan cases, legal techniques were abandoned by the U.S. once a determination was made that Noriega's removal necessitated recourse to force, an action the O.A.S. was apparently unwilling to countenance.

Since legal techniques were ultimately abandoned by the U.S., it is not surprising that the law assumed a lower profile in the manner in which the U.S. tried to legitimize its action than it did in the previous instances of U.S. involvement in military action in the Americas. The U.S. presented poorly developed legal arguments in what seems to have been a half-hearted attempt to justify its action legally U.S. policymakers probably realized that the invasion of Panama would be unable to withstand legal scrutiny in the international community This may account for the strong emphasis

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[178] The U.S. also sought to justify the Grenada action as a measure necessary to protect U.S. nationals in Grenada and as an intervention prompted by an invitation from the lawful governmental authority in Grenada. Joyner, *supra* note 161, at 134-39; *see also* Boyle, Chayes, Dore, Falk, Feinrider, Ferguson, Jr., Fine, Nunes, Westen, *International Lawlessness in Grenada*, 78 AM. J. INT'L L. 172, 172-73 (1984). Other factors also may account for the difference in international support for the Dominican Republic and Grenadan action. The international community may have become more sensitive in the intervening eighteen years to attempts by states to shield an unlawful assertion of power by clothing it in legal garb. Also, the environment in the Dominican Republic preceding the U.S. action arguably represented a greater danger to foreign nationals than the situation that existed prior to the U.S. action in Grenada. The U.S. could more credibly rely on the need to protect foreign nationals in the Dominican Republic as a legal justification for the action.

[179] *See A Hemisphere Feels Invaded*, L.A. Times, Dec. 23, 1989, § B, at 6, col. 3.

placed on the context in which the unlawful action was committed. The U.S. may have hoped either that its action could be justified by the mitigating circumstances or that these factors would at a minimum temper the response of the international community to its unlawful assertion of power.

Wider lessons can be learned from U.S. actions in Panama. Preventative measures could have resulted in greater international support for U.S. actions against Panama. The evidence available indicates that the U.S. was well aware of Noriega's drug-trafficking activities for years prior to the crisis. The U.S. continued to support him despite this knowledge because of his pro-American activities and connections with the C.I.A. If the U.S. had exposed his illegal activities years ago, subsequent U.S. efforts to persuade the international community to condemn Noriega's activities might have been more persuasive. In addition, the eventual unlawful assertion of power by the U.S. could have been avoided if the U.S. chose goals to which it was legally entitled.[180] If the U.S. had formulated as its key objective exposing the drug-trafficking activities of Noriega, the abuses of human rights under his regime, and the denial of democratic processes, the U.S. would have been able to achieve these goals without resorting to force. Instead of presenting a dispassionate appraisal of these facts, U.S. officials insisted on Noriega's removal and expended an inordinate amount of energy in launching personal attacks against Noriega. As Fisher advises, "[T]he best advocacy does not contend that one's opponent is an evil idiot with nothing to be said for him. Such arguments carry little weight to neutrals, who suspect that there must be something to be said for both sides, and carry no weight to adversaries."[181]

If the U.S. had stuck to narrower objectives for which a strong legal claim would be presented or even if the U.S. continued to use legal techniques to bring about Noriega's downfall,[182] it is entirely possible that Noriega eventually would have been witness to his own undoing. The election results in Panama reflected a widespread lack of popular support. With sanctions increasingly

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[180] *See* R. FISHER, *supra* note 170, at 51.

[181] *Id.* at 70.

[182] Fisher persuasively reasons that "a strong case can be made for reconciling the pursuit of victory with the pursuit of peace by trying to win, but only by lawful means. Law thus offers one strategy for pursuing these two goals simultaneously: As you try to win, accept the rules of law as constraints on your behavior. "Acting as a restraint, law does not preclude a government from trying very hard to win; it simply limits the means employed." *Id.* at 78, 84.

strangling the Panamanian economy, Noriega's popularity was dwindling at a rapid rate. The collapse of communism throughout Eastern Europe attests to the inability of regimes to govern indefinitely absent popular consent.

CONCLUSION

While U.S. failure to comply with the rules regulating the use of force threatens the development of a strong international legal order, it does not negate the legally binding character of these rules. Although there have been many armed conflicts since World War II, the majority of states act in accordance with the rule outlawing unilateral recourse to force most of the time.[183] Also, in trying to establish the legitimacy of its actions on the basis of factual assumptions that fall within the law, the U.S. effectively recognizes the authority of the law. As James Barros accurately observes,

> The establishment of international norms is important in governing inter-state relations. These legal norms are rights which states recognize exist, which they invoke, and which they admit they are obligated to serve. Their violation does not erase them anymore than an individual can erase municipal law by violating it. Indeed, like the individuals who violate municipal law, states do not claim they are above the law They may defend their acts in various ways, but never on the grounds that international law does not exist or that it is not binding on them.[184]

On the other hand, states pursuing a course of unilateral military intervention gradually widen the gap between the rules regulating the use of force and the actual practice of states.[185] If enough states resort to unilateral military intervention, eventually a credibility gap emerges that weakens efforts to strengthen world order and thereby fails to enhance or maintain international peace and security, the principal aim of the United Nations. Determinations to use force form an integral part of the law shaping process in that judgments as to whether subsequent actions will be tolerated

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[183] *See* L. HENKIN, HOW NATIONS BEHAVE: LAW AND FOREIGN POLICY 138-39, 146-53 (1979); Damrosch, *supra* note 168, at 1-2.

[184] J. BARROS, INTRODUCTION, in THE UNITED NATIONS: PAST, PRESENT AND FUTURE 1, 10 (1972).

[185] *See* Bowett, *Reprisals Involving Recourse to Armed Force*, 66 AM. J. INT'L L. 1-17 (1972).

are impacted.[186] This is especially the case when a major superpower resorts to force. As Falk has stated,

> An opportunistic use of legal argument by a state so conservative and powerful as the U.S. sets a tone for international life that is bound to influence the overall prospects for strengthening the law habit among [other international actors].[187]

A classic example of this can be seen in the Soviet Union's handling of events in Lithuania. After the Soviet Union raided a hospital providing sanctuary to Lithuanian army deserters, Sweden said Moscow's handling of the situation compared favorably with United States actions in Panama. In defending his country's actions in Lithuania, General Secretary Gorbachev stated that the U.S. would have resolved the impasse in twenty-four hours, referring to the invasion of Panama.[188]

The unlawful U.S. action in Panama can serve only to tarnish the reputation of the U.S. as a law-abiding nation and diminish its ability to affect international affairs in the future. As Fisher correctly observes,

> One means of maintaining and increasing the power of a state to influence others is to increase the degree to which law operates as a constraint on the means used in the pursuit of short-term victories.[189]

In the final analysis, the U.S. cannot have its cake and eat it too. In resorting to unilateral military intervention, the U.S. cannot ultimately remain unscathed no matter how much it insists on being the final arbiter of its own actions under international law and regardless of the efforts undertaken to avoid community judgments. Schachter explains that appraisals of the legality of state conduct, "especially in regard to the use of armed force, are made in a variety of nonjudicial contexts and that, in the end, no state

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[186] *See* Schachter, *Self-Defense and the Rule of Law*, 83 AM. J. INT'L L. 259 (1989): "Legality matters[,] not only as rhetoric to win support, but also as a factor to be taken into account as part of the effort to contain violence and reduce risks of escalation." *Id.* at 266 (footnote omitted). "Most governments are aware of the implications for other conflicts. " *Id.*

[187] Falk, *U.S. Naval War College International Law Studies* 62, 65 (1947-1977).

[188] Remarks of Gorbachev at Joint Ottawa Press Conference with Canadian Prime Minister Brian Mulroney, Soviet-Canadian Summit (1990).

[189] R. FISHER, *supra* note 170, at 53.

is actually the sole judge of its own cause when it claims to have used force in self-defense."[190]

As Schachter explains,

> To be sure, a nonbinding condemnation or rebuke does not have the enforceability of a judicial decision in a national court. But that is not to say that such critical judgments are without effect. Censure carries with it political costs. Those costs are not trivial, as shown by the intense efforts of governments to avoid censure and to demonstrate the legitimacy of their conduct.[191]

The U.S. has undermined the rules regulating the use of force that it assisted in drafting after World War II to foster a stable world order. As Hoyt has pointed out,

> American [foreign] policy has swung back and forth between defending the U.N. rules against the use of force and undermining them. [192]

The U.S. cannot credibly insist that other countries abide unequivocally by the rules outlawing armed force when it is prepared to distort the permissible parameters of, and effectively subvert, those same rules.

Stripped of its legal cover, the U.S. invasion of Panama amounts to no more and no less than a naked display of misperceived short-term self-interest designed to maintain the U.S. sphere of influence in the Western hemisphere. Glaringly compromised by this action is the U.S. national interest in maintaining the rules of coexistence necessary to ensure survival.[193] Since the use of force can perilously escalate to global catastrophe in the nuclear age, national interest in avoiding conflict is self-evident.[194] The rules regulating the use of force overlap and reflect national interest, both short and long-term. This proposition holds especially true for the U.S. As one of the architects of the new international legal order, the rules are heavily tipped in favor of the U.S. as a "status quo power." It is invariably in the U.S. interest to adhere unequivocally to the rules of international law

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[190] *See* Schachter, *supra* note 63, at 119-22, 131-32.

[191] *Id.* at 146.

[192] E. HOYT, *supra* note 7, at 1.

[193] *See* Schachter, *supra* note 63, at 146.

[194] *See* A. EIDE, *Outlawing the Use of Force: The Efforts by the United Nations*, in THE UNITED NATIONS AND THE MAINTENANCE OF INTERNATIONAL PEACE AND SECURITY 99, 113 (1987).

> Adherence to the rules of international law is consistent with the national security interests of the United States, whether considered expansively in terms of furthering world public order or parochially in terms of satisfying selfish goals. The classic Machiavellian dichotomy between the "is" and the "ought to be" does not hold true for American foreign policy The expedient and the just coincide and reinforce each other. This situation exists because the United States is the outstanding example of a *status quo* power. Consequently, American national interests include respect for international law by the United States and other governments. Such conformity encourages the peaceful preservation of the political, economic and military *status quo* heavily weighted to America's advantage. Phenomenologically, law is the instrument *par excellence* for the peaceful preservation and transformation of any political or economic *status quo*. By its very nature, the international legal order represents an attempt by advantaged international actors to legitimate and consolidate existing and proposed power relations. When major *status quo* powers threaten or use force for reasons not explicitly sanctioned by contemporary standards of international law, formally accepted by all states in the world community, they undermine the integrity of the very international legal order that they constructed to protect their vital national interests. Consequently, those states that currently benefit the most from the existing arrangement of international relations should not unwittingly lose them by resorting to, or encouraging, illegitimate violence and coercion. [195]

The U.S. action in Panama is utterly out of sync with the post Cold War era. As a result of Gorbachev's new thinking policy of "Perestroika" in the international arena, the Soviet Union has highlighted the need to abandon the traditional notions of ideological confrontation between the East and West.[196] The Soviets have

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[195] Boyle, *International Law as a Basis for Conducting American Foreign Policy*, 8 YALE J. WORLD PUB. ORDER 107-109 (1981).

[196] In a report to the Soviet Communist Party Central Committee's Plenary Meeting in February 1990 on the Draft of the 28th Party Congress, Gorbachev spoke frankly about the need to abandon the traditional notions of confrontation:

> "The platform states clearly what we should abandon. We should abandon the ideological dogmatism that became ingrained in past decades outmoded views of the world revolutionary process and world development as a whole.
>
> We should abandon everything that led to the isolation of socialist countries from the mainstream of world civilization. We should abandon the understanding of progress as a permanent confrontation with a socially dif-

exhibited a renewed interest in the U.N. as a means of strengthening the international legal order[197] and have stressed the need for unequivocal adherence to the international rules regulating the use of force.[198] Recognizing the discrepancy between words and deeds, the Soviets withdrew their forces from Afghanistan and acknowledged the violation of international law that action entailed:

> If we want to be a part of the civilized world, we must take account of how our words and deeds are perceived.
>
> Perestroika . [consists] in preventing discrepancies between words and deeds and in modifying the style and methods of our work.
>
> The new political thinking has given us a new scale of values

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ferent world."

Gorbachev, The Report to the Soviet Communist Party Central Committee's Plenary Meeting on the Draft of the 28th Party Congress (Feb. 5, 1990), *reprinted by* Novosti Press Agency, Moscow (1990).

[197] The Soviets have urged greater reliance on the U.N. and have agreed to pay arrears to the U.N. for programs which that country previously refused to support:

> I would like to stress the importance of the role of the U.N. I am convinced that the revival of its role and peacemaking functions is a major step towards peace in human history.

Excerpts from Address by Gorbachev (Mar. 15, 1990) *reprinted by* Novosti Press Agency, Moscow 15 (1990). The present Soviet posture with regard to the U.N. represents a phenomenal change in Soviet attitude toward that organization. Hazard states that the U.N. was previously regarded as a "potential capitalist cabal which must be watched warily whenever it acted." The renewed interest in the U.N., according to the Soviets, is based on the current belief in the supremacy of general human values over class, ideological, and other interests:

> "[F]aith in the U.N. organization is being revived. Among the reasons behind this revival is that useless arguments on the advantages of one social system or set of ideological values over another has been abandoned. Such arguments only led to confrontation and served to distract the attention and efforts of this international organization away from the necessity of ensuring stable and decent living conditions for millions of people."

S. LAVROV, NEW THINKING AND SOCIAL PROGRESS 40 (1990); *see also* Butler, *International Law, Foreign Policy and the Gorbachev Style*, 42 J. INT'L AFF. 363, 370-74 (1989); Hazard, *The Gorbachev Era in the U.S.S.R.. The Best and Worst of Times*, 15 SYRACUSE J. INT'L L. & COM. 1, 10 (1988).

[198] Suggesting unequivocal adherence to the general international rules regulating the use of force with regard to both the capitalist and socialist states is novel in Soviet international legal theory. This suggestion, coupled with Gorbachev's demonstrated willingness to let Eastern European countries charter their own destinies, constitutes an implicit renunciation of the Brezhnev Doctrine under which the Soviets previously asserted a right and duty to render military assistance to other socialist countries under threat. It also implicitly signals an acknowledgment that the Brezhnev Doctrine was contradictory to general international law.

> and new criteria for our conduct. We have declared that we will be guided by universal human values. These are no vague abstractions: they exist, and they cannot be interpreted in an arbitrary or selective way
>
> There are universally recognized instruments to give us our bearings, mainly the United Nations Charter, and the declarations, covenants, conventions and resolutions ratified and observed by most of the world's countries.
>
> For years, over a hundred United Nations members condemned one Soviet action [the invasion of Afghanistan]. What more did we need to see that we were at odds with the world community, violating international norms and universal human interests?
>
> The United Nations Charter recognizes the right to individual and collective defence and the right to give military aid to other countries. Yet it severely restricts such actions and calls for using non-military methods, the good offices of the United Nations and other means of political settlement as far as possible.
>
> As we make major changes in our approach to international relations, we have to take into consideration the existing system of mutual obligations.
>
> The observation of treaties, agreements and contracts is one of the fundamental principles of international law [199]

The U.S.S.R. may have come to appreciate that compliance with international law serves both its short-term and long-term national interests.[200] Although the U.S. recognizes the authority of the law, the U.S invasion of Panama demonstrates that the inter-

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[199] Excerpts of Address by Shevardnadze (Oct. 23, 1989) *reprinted in* FOREIGN POLICY AND PERESTROIKA 40 (1989).

[200] Despite Gorbachev's bold new thinking policy, unanswered questions still linger in the international community. Is new Soviet thinking a sincere attempt to strengthen the international legal order, a tactical maneuver designed to lower international tension to permit the U.S.S.R. to focus its attention and financial resources on restructuring a severely ailing economy, or both? Only time will provide the answer to these questions. The coming months and years will demonstrate whether Gorbachev's unparalleled proposal to establish the primacy of international law over national policy is truly revolutionary or just a passing fancy in Soviet international legal theory and practice. In the interim, the international community should not be dissuaded from cautiously applauding Gorbachev's new thinking policies while at the same time continuing to judge his policy of perestroika, as Shevardnadze suggests, according to deeds rather than just words. *See* Quigley, *Perestroika and International Law*, 82 AMER. J. INT'L L. 788, 789-91 (1988); Rogers, Jr., *Glasnost and Perestroika: An Evaluation of the Gorbachev Revolution and Its Opportunities for the West*, 16 DEN. J. INT'L L. & POL'Y 209, 211-14, 240-41 (1988).

national rules regulating the use of force in reality merely influence, rather than reign supreme over, national policy. As the U.S.S.R. at least recently has increasingly recognized the necessity of complying with the international rules regulating the use of force, the U.S. has in Panama misguidedly abandoned the law in shaping its goals in international affairs and ultimately in the means used to achieve those goals.

The ability of the U.N. to achieve its primary goal of maintaining peace and security has been impaired in part by East-West superpower conflict and the resulting ideological division that in virtually all instances paralyzed the U.N. Security Council. Gorbachev's new thinking policy of Perestroika offers the U.S. a golden opportunity to reinvigorate the United Nations so that it can more fully realize its noble aspiration of maintaining a universal order in which nations can live peacefully within their borders to save succeeding generations from the "scourge of war."

The U.S. would be wise to embrace by deeds and not just words the challenges presented by Gorbachev's bold new thinking policy The U.S. should cease distorting and circumventing the rules regulating the use of force and rely upon these rules as the sole guide for the shaping of U.S. objectives in the Americas and the process by which the U.S. seeks to achieve those objectives.[201]

[201] R. FISHER, *supra* note 170, at 53.